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I. Introduction.....	1
II. <i>Jus in Bello</i> : Humanitarian Law as a Restraint on Property Acquisition in War.....	3
A. The Historical Development of Humanitarian Laws Restricting Property Acquisition in War.....	3
1. Overview.....	3
2. Historical Antecedents to the Development of Humanitarian Law.....	4
3. The Codification of Humanitarian Law.....	6
B. Humanitarian Laws Restricting Property Acquisition in War.....	14
1. Public Property.....	14
a. Overview.....	15
b. Prohibitions Related to Acquisition of Public Property.....	16
(1) Belligerents May Not Acquire Public Property Without Military Necessity.....	16
(2) Belligerents May Not Threaten the Survival of Civilian Populations Through Property Acquisition.....	21
c. Title Transfer and the Acquisition of Public Property.....	23
2. Private Property.....	25
a. Overview.....	25
b. Prohibitions Related to Acquisition of Private Property.....	26

(1)	Belligerents May Not Acquire Private Property Without Military Necessity and Compensation.....	26
(2)	Reprisals Against Private Property Are Prohibited.....	30
c.	Title Transfer and the Acquisition of Private Property.....	30
(1)	Requisition.....	31
(2)	Seizure.....	32
3.	Cultural Property.....	36
a.	Cultural Property Defined.....	36
b.	Why Cultural Property Merits Special Protection in War.....	39
c.	Prohibitions Related to Acquisition of Cultural Property.....	41
(1)	Belligerents May Not Acquire Cultural Property.....	41
(2)	Belligerents May Not Requisition Cultural Property.....	44
(3)	Reprisals Against Cultural Property Are Prohibited.....	45
d.	Title Transfer and the Acquisition of Cultural Property.....	46
III.	<i>Jus ad Bellum: Justification for War as a Restraint on Property Acquisition in War.....</i>	49
A.	Overview.....	49
B.	The Historical and Philosophical Development of International Law Constraining the Resort to Force.....	50
1.	Legitimacy, Morality, and the Just War.....	50



2.	Legitimacy in the Age of Positivism.....	52
3.	Legitimacy in the International Era.....	55
IV.	How the Limitations Upon Resort to Force Impact Property Acquisition in War.....	59
A.	Wars May No Longer Be Fought for the Purpose of Acquiring Property.....	59
B.	Wars Initially Fought for Legitimate Purposes May Become Illegitimate Through Disproportionate or Illegal Property Acquisition.....	61
C.	Application of <i>Jus in Bello</i> and <i>Jus ad Bellum</i> Restrictions Upon an Armed Force Acquiring Property in War.....	68
1.	Introduction.....	68
2.	Boots to Booty: Militarily Usable Property...	68
3.	Bombs to Booty: The Weaponry of War.....	71
4.	Bullion to Booty: Cash, Gold, and Realizable Securities.....	73
5.	Barrels to Booty: Oil and Other Natural Resources.....	81
6.	Bukharas to Booty: Souvenirs and War Trophies.....	84
a.	Individual War Trophies.....	84
b.	Unit and National Level War Trophies.....	88
7.	Bells to Booty: The Seizure of Cultural Property.....	91
a.	Misused Cultural Property.....	91
b.	Ideological Cultural Property.....	94
V.	Conclusion.....	100

**Boots to Booty: The Overarching Restraints Imposed by *Jus ad Bellum* Justifications on Property Acquisition in War**

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## I. INTRODUCTION

Historically many wars have been fought to acquire property, either as the purpose for the war or a sanctioned byproduct of it. Plunder and pillage gave soldiers an added incentive to join in campaigns of conquest. Spoils and booty enriched victorious nations and humiliated the vanquished. War trophies filled royal dwellings, graced public squares, and filled museums.

War produced terrible consequences not only to the defeated, but to noncombatants caught in the fray. Civilian inhabitants lost their possessions and lives. Armies damaged or destroyed cultural property as they marched across the enemy's domain. Scorched earth tactics led to starvation. Ironically the lure of spoils eroded the discipline of fighting forces, whose attention shifted to stuffing their rucksacks even before the enemy had been defeated. Acts of pillage and plunder exacerbated the task of restoring peaceful relations in a post-war environment. Something had to be done to constrain the evil of war.

In the 19th and 20th centuries, a two front campaign sought to reign in the horrors of war through international law. First came the recognition that within war humanitarian rules observed by all belligerents were needed

to protect noncombatants and cultural property from destruction. Later came efforts to attack the evil at its root by restricting resort to war in the first place.

These two prongs of international law are typically characterized as *jus in bello* for the laws within war, and *jus ad bellum* for the laws govern the resort to war. Many scholars address these two areas separately. Studies on the resort to war focus on internationally accepted norms of legitimacy prior to the first salvo in war. Then the baton is passed to experts on the law of armed conflict and humanitarian law, who focus upon constraints upon the conduct of war arising from conventions and customary international law.<sup>1</sup>

In reality both bodies of law constrain the permissible scope of property acquisition in war. While *jus in bello* rules spell out specific limitations and prohibitions against acquiring different types of property in war, *jus ad bellum* justifications provide an overarching requirement that property acquisition not stray from the objectives which legitimized the resort to force in the first place. Necessity and proportionality are two

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<sup>1</sup> One key distinction which separates *jus ad bellum* from *jus in bello* is that the latter applies whether or not the armed conflict itself is lawful or unlawful in its inception under *jus ad bellum*. See, e.g., ADAM ROBERTS & RICHARD GUELF, DOCUMENTS ON THE LAWS OF WAR 1 (2d ed. 1989). This paper does not quibble with this distinction, but rather focuses upon the principle that property acquisition within war is constrained by the objectives which justified resort to war in the first place—in other words, *jus ad bellum* creating additional *jus in bello* limitations.

measuring sticks against which all military action is judged, from the political decision to apply force to the tactical decision on how to achieve a localized battlefield objective.

This paper addresses property acquisition in war through both lenses to identify the boundaries of permissible property acquisition in war. Section II outlines the development and current state of *jus in bello* restrictions, with a special focus upon conventions that restrict property acquisition in war with the force of black-letter, if not customary law. Section III takes a similar approach with *jus ad bellum* rules. Finally Section IV examines the ways in which *jus ad bellum* rules interact with property acquisition in war.

## **II. *Jus in Bello*: Humanitarian Law as a Restraint on Property Acquisition in War**

### **II.A. The Historical Development of Humanitarian Laws Restricting Property Acquisition in War**

#### **II.A.1. Overview**

The International Committee of the Red Cross has defined humanitarian law as the "international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict."<sup>2</sup> This section will briefly trace the evolution of humanitarian law, focusing on limitations placed upon property acquisition in warfare.

#### **II.A.2. Historical Antecedents to the Development of Humanitarian Law**

Historically war has gone hand in hand with destruction and the right to booty. As a general rule, the property of the vanquished belonged to the conqueror.<sup>3</sup> The Romans fought to conquer, and conquest was accompanied by

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<sup>2</sup> JIRI TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 26 (1996). The U.S. Army's manual on the *Law of Armed Warfare* describes the purpose of the law of war as follows: [T]he law of land warfare...is inspired by the desire to diminish the evils of war by:

- a. Protecting both combatants and noncombatants from unnecessary suffering;
- b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
- c. Facilitating the restoration of peace.

DEP'T ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 2 (Jul. 1956) [hereinafter FM 27-10].

<sup>3</sup> TOMAN, *supra* note 2, at 3.

pillage.<sup>4</sup> The Middle Ages were little different. The Germanic armies and Crusaders laid waste as they went.<sup>5</sup> Rules against pillage were promulgated, but they were little heeded. Instead soldiers were permitted to capture as much booty as the fighting permitted to be centrally gathered and redistributed in accordance with a soldier's rank and merit at the conclusion of the conflict.<sup>6</sup> Hugo Grotius, known as the "father of international law," adhered to this view of war: "By the law of nations...in a public war anyone at all becomes owner, without limit or restriction, of what he has taken from the enemy."<sup>7</sup>

The idea that there should be constraints upon the devastation in war also has ancient roots. The Greek historian Polybius argued that "The city should not owe its beauty to embellishments brought from elsewhere but to the virtue of its inhabitants...future conquerors should learn not to strip the towns that they subjugate and not to inflict misfortune on other peoples, the embellishment of their native land."<sup>8</sup> Early dissent against pillage focused upon the senseless destruction of sacred sites, against the interference pillage caused to military operations, and the

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<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.*

<sup>6</sup> See Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 115 (2001).

<sup>7</sup> See TOMAN, *supra* note 2, at 5 (citing 3 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TREOS* 664 (F.W. Kelse, Trans., 1925)).

<sup>8</sup> *Id.* at 4.

pure morality of plundering for personal or national enrichment.<sup>9</sup>

In the Middle Ages institutions such as the Church sought to mitigate the consequences of war by seeking the protection of religious property. Saint Augustine preached that the taking of booty was a sin, however these remonstrations did little to curtail the practice.<sup>10</sup>

During the Renaissance some international law scholars began to argue for the protection of cultural property. Emmerich de Vattel argued that buildings that are an honor to the human race and which do not add to the strength of the enemy, such as "temples, tombs, public buildings and all edifices of remarkable beauty" should be spared the devastation of war.<sup>11</sup>

### **II.A.3. The Codification of Humanitarian Law**

The nineteenth century saw clearer expressions of limitations on the right of pillage and plunder—most importantly a growing distinction between property acquisition which directly benefited the war effort and that which should instead be protected, especially cultural

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<sup>9</sup> *See id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 5.



property. Restrictions on the seizure of property arose out of lessons learned from the wars of the 18th and 19th centuries, and evolved from principles discussed at conferences to binding conventions.

The ultimate restraint upon property acquisition was identified early by one 19th century international law writer who stated, "the military authority may, within the limits of its power, seize the movable public property of the enemy to the extent that it may serve for the operations of war" (emphasis added).<sup>12</sup> In 1815 the allies forced Napoleon to provide restitution of works of art taken to France because in the words of Lord Castlereagh, the removal of works of art was "contrary to every principle of justice and to the usages of modern warfare."<sup>13</sup>

In 1863 instructions for the U.S. Army during the Civil War, known after their author Francis Lieber as the "Lieber Instructions," laid the groundwork for the codification of laws of war regarding property acquisition.<sup>14</sup> Article 31 of the Instructions permitted the appropriation of public property and monies in accord with

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<sup>12</sup> *Id.* (citing JEAN-GASPAR BLUNTSCHLI, *LE DROIT INTERNATIONAL CODIFIE* 362 (5<sup>th</sup> ed. 1895)).

<sup>13</sup> *Id.* (citing Stanislaw E. Nahlik, *Protection of Cultural Property*, in *INTERNATIONAL DIMENSIONS OF INTERNATIONAL LAW* 204 (1988)).

<sup>14</sup> See *Instructions for the Government of Armies of the United States in the Field*, reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 3 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter *DOCUMENTS*].

prior practice of nations.<sup>15</sup> But other articles outlined restrictions to the right of capture. Cultural property received protection in articles 34 through 36. Article 34 states that the property belonging to "churches, to hospitals or other establishments of an exclusively charitable nature, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character--such property is not to be considered public property in the sense of Article 31; but may be taxed or used when the public service may require it."<sup>16</sup> Removal of cultural property was allowed provided it could be done without injury to the property, but ultimate ownership was to be settled by the ensuing peace treaty. In no case was captured cultural property to be sold or given away, privately appropriated, or wantonly destroyed or injured.<sup>17</sup> Pillage merited severe punishment.<sup>18</sup> "Strictly private property" received protection, but was still subject to appropriation for "temporary and military" uses.<sup>19</sup> Military

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<sup>15</sup> *Id.* art. 31, at 8.

<sup>16</sup> *Id.* art. 36, at 8.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* arts. 11 & 14, at 5 & 10.

<sup>19</sup> *Id.* art. 37, at 9.

necessity and compensation were required, to protect the property interests of the spoiled owner.<sup>20</sup>

The Lieber Instructions influenced the development of military law in other countries.<sup>21</sup> Jean-Gaspar Bluntschli drew from these guidelines and other developments the conclusion that "the removal of items or documents of artistic value, although it was still the custom during the revolutionary wars at the start of the century, is already considered by public opinion to be an act of vandalism because objects d'art have no direct connection with the aims pursued by the State when it wages war but are the eternal monuments of the peaceful development of nations."<sup>22</sup>

The Lieber Instructions also influenced the Brussels Conference of 1874, which produced a draft *Declaration Concerning the Laws and Customs of War*.<sup>23</sup> The Declaration greatly influenced the future codification of laws despite not being ratified. The Institute of International Law at Oxford produced a manual in 1880 which incorporated the

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<sup>20</sup> *Id.* art. 38, at 9.

<sup>21</sup> See TOMAN, *supra* note 2, at 7.

<sup>22</sup> *Id.* at 7-8 (citing JEAN-GASPAR BLUNTSCHLI, *LE DROIT INTERNATIONAL CODIFIE* 42-43 (5<sup>th</sup> ed. 1895)). Bluntschli also addressed the inviolability of private property not subject to military usage, writing:

The equipment of enemy soldiers, their weapons, and their horses may still be seized today because these objects can be considered as the means of waging war and their nature as private property here remains in the background. These things are used for waging war and are the victor's prize. To take from a conquered enemy his money or other objects of value, however, is considered an unworthy act, contrary to the laws of warfare of civilized nations.

*Id.* at 8.

<sup>23</sup> Project of an International Declaration Concerning the Laws and Customs of War, *reprinted in* DOCUMENTS, *supra* note 14, at 25 [hereinafter Brussels Conference].

provisions of the Brussels Declaration nearly verbatim, and proscribed punishment for offenders under the penal code.<sup>24</sup> Likewise the Brussels Declaration formed the blueprint for the subsequent Hague Conventions of 1899 and 1907.<sup>25</sup>

Humanitarian law achieved the status of positive law with the International Peace Conferences at the Hague in 1899 and 1907. Key provisions of the Hague Convention of 1907<sup>26</sup> and its annexed regulations still provide the framework protection for cultural property, private property and even public property seizure in war.<sup>27</sup>

The "Roerich Pact," drawn up by the Pan-American Union and signed on April 15th, 1935, continued the effort to protect cultural property from damage in war by requiring such property be marked with a distinctive emblem and not be put to military uses.<sup>28</sup> Article 1 stated that "historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents."<sup>29</sup>

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<sup>24</sup> See *The Laws and Customs of War on Land* (1880), reprinted in DOCUMENTS, *supra* note 14, at 35; TOMAN, *supra* note 2, at 9-10.

<sup>25</sup> See DOCUMENTS, *supra* note 14, at 25.

<sup>26</sup> See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention of 1907].

<sup>27</sup> See discussion Parts II.B.1 (public property), II.B.2 (private property), and II.B.3 (cultural property), *infra*.

<sup>28</sup> Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 [hereinafter Roerich Pact].

<sup>29</sup> *Id.* art. 1, 49 Stat. at 3268, 167 L.N.T.S. at 290.

World War II witnessed both widespread destruction of cultural property and systematic plunder and looting on an incredible scale. The desire to prevent this horror in the future animated the founding of the United Nations, the passage of the Universal Declaration of Human Rights, and the adoption of the Geneva Conventions of 1949.<sup>30</sup> The post-war Nuremberg war crimes tribunals also brought unprecedented individual accountability for war crimes, which included plunder of public and private property in violation of the Hague Convention of 1907 and customary international law.<sup>31</sup>

The Geneva Convention on the Protection of Civilian Persons in Time of War<sup>32</sup> bolstered the framework built by the Hague Convention of 1907 by further protecting civilian persons and property. Pillage was prohibited and extensive appropriation unjustified by military necessity was identified as a "grave breach" that could have serious consequences for the perpetrators.<sup>33</sup>

The Hague Convention on Cultural Property of 1954 also arose out of a post-WWII desire to strengthen the

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<sup>30</sup> See TOMAN, *supra* note 14, at 21.

<sup>31</sup> See Charter of the International Military Tribunal, art. 6(b), *annexed to* Agreement by the Government of the United States of America et al. for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 [hereinafter Charter of the International Military Tribunal].

<sup>32</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention-Civilians].

<sup>33</sup> See *id.* arts. 33, 147; see also discussion Parts II.B.1 (public property) and II.B.2. (private property) *infra*.

protection of cultural property.<sup>34</sup> In addition to new protective measures to prevent damage or destruction to cultural property, the 1954 Convention provided prohibitions against theft, pillage, and misappropriation of cultural property. Additionally, parties are to refrain from requisitioning cultural property, or making it the subject of reprisals. Protocol I to the 1954 Hague Convention, simultaneously executed, prohibits exporting cultural property out of occupied territory and mandates its return at the conclusion of hostilities. These provisions are discussed in detail in Part II.B.3 below.

UNESCO continued the drive to secure protection of cultural property with two conventions in the 1970s; one on "Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,"<sup>35</sup> and the other "Concerning the Protection of the World Cultural and Natural Heritage."<sup>36</sup> Neither Convention focused upon protection in wartime, although the danger posed by war was

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<sup>34</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention of 1954]. As of the fiftieth anniversary of its signing in May 2004, 109 states have become parties. The United States did not ratify the Convention because of concerns the Soviet Union might use its provisions to shield strategic targets. See Winthrop, *Law of War Treaty Developments*, ARMY LAW. 55, 57 (1994). These concerns have largely dissipated with the end of the Cold War. See *id.* The United States considers most provisions of the Convention to be reflective of customary law and President Clinton submitted the Convention and its simultaneously executed Protocol to the Senate on January 6, 1999. See Letter of Transmittal, Jan. 6, 1999, 1954 U.S.T. Lexis 388.

<sup>35</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 10 I.L.M. 289, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]. The United States ratified the 1970 UNESCO Convention on February 9, 1983.

<sup>36</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 10 U.N.T.S. 151. The United States has not joined this Convention.

specifically contemplated by both. The Convention on Illicit Transfers in particular deems transfers of cultural property out of occupied territory as per se "illicit."<sup>37</sup>

Likewise the International Committee of the Red Cross continued facilitating the development of international humanitarian law by expanding upon the Geneva Conventions of 1949. In 1977 two additional protocols to the Geneva Conventions were adopted, which not only added additional protections to innocents caught up in war, but also extended the scope of coverage to reach more conflicts of an internal, vice international nature. Protocol I gave more specificity to the restrictions upon an occupying power's use of the resources of the occupied territory.<sup>38</sup> Protocol II extended some of the Geneva Convention's protections to internal conflicts, including pillage.<sup>39</sup> These provisions are discussed in Parts II.B.1 (public

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<sup>37</sup> See discussion Part II.B.3 *infra*.

<sup>38</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Conventions Protocol I]. The United States has not joined Protocol I because of numerous objections. See Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, S. TREATY DOC. NO. 100-2, at iii-v (1987) (calling Protocol I "fundamentally and irreconcilably flawed"). Nonetheless the United States considers many of its provisions to accurately reflect existing customary international law. See L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT xv (1993) (referencing a report by General Colin Powell, then Chairman of the U.S. Joint Chiefs of Staff, to Congress in 1991 in which he made clear that the "provisions of the Protocol were, for the main part, applied as if they constituted customary law").

<sup>39</sup> Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Jun. 10, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Conventions Protocol II].

property), II.B.2 (private property), and II.B.3 (cultural property) below.

In 1999 UNESCO produced a second protocol to the Hague Convention of 1954.<sup>40</sup> This protocol reiterated prohibitions against removing cultural property from occupied territories, proscribed certain categories of offenses, and provided the actions signatory nations should take to address them.

Having traced the progressive codification of humanitarian law relevant to property acquisition in war, we will turn in the next section to identifying the current state of humanitarian law for each of three main categories of property: public, private, and cultural. This will set *jus in bello* markers to permit further examination in Parts III and IV on how *jus ad bellum* considerations further restrict property acquisition in war.

## **II.B. Humanitarian Laws Restricting Property Acquisition in War**

### **II.B.1. Public Property**

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<sup>40</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Hague Convention Protocol II] (in force as of Mar. 9, 2004).



## II.B.1.a. Overview

Property belonging to an enemy state captured by a belligerent has historically been considered legitimate booty or spoils of war.<sup>41</sup> Humanitarian law has only curtailed the scope of this power to protect specific interests.<sup>42</sup> First, the acquisition of public property has been limited to that required by military necessity. This prohibition derives from a general effort to keep war and its impact within the narrowest confines possible, and is discussed below. Second, state-owned cultural property has been given special protection.<sup>43</sup> This development logically follows from the first, since the seizure of cultural property could rarely if ever serve a military purpose. Third, while occupation forces may make use of the resources of an occupied territory, this license is subject to the caveat that the needs of the civilian population be met. This caveat also constrains appropriating medical and civil defense property needed to protect civilians, and is discussed below.

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<sup>41</sup> See Yoram Dinstein, *Booty in Land Warfare*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 432 (Rudolph Bernhardt ed., 1992); FM 27-10, *supra* note 2, ¶ 59.a.

<sup>42</sup> Humanitarian laws should not be considered as conveying "rights" upon belligerents, but rather "liberties" which they can exercise without violating *jus in bello* restrictions. See Christopher Greenwood, *The Relationship Between Ius Ad Bellum and Ius In Bello*, 9 REV. INT'L STUD. 221, 228 (1983). The underlying principle is that war is not an institution established by international law, but rather a de facto situation the law seeks to contain. *Id.* Belligerent's rights are not determined so much by law, but by power, which *jus in bello* seeks to limit. *Id.* at 229.

<sup>43</sup> See discussion Part II.B.3 *infra*.

Following an overview of the humanitarian law restrictions on acquisition of public property will be a brief discussion on title transfer. The resulting construct lays the foundation for a fourth limitation upon the acquisition of public property in war derived from the purposes for which the war is fought. This limitation derives from *jus ad bellum* rules and is the subject of Parts III and IV below.

#### **II.B.1.b. Prohibitions Related to Acquisition of Public Property**

##### **II.B.1.b(1). Belligerents May Not Acquire Public Property Without Military Necessity**

Many writers discussing the seizure of public property require that the armed forces focus ask whether the property has the character of being usable for a military purpose, without stressing the follow-up question whether there is actual military necessity requiring its seizure.<sup>44</sup> The character of the property is crucial of course.

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<sup>44</sup> See, e.g., Lassa Oppenheim, 2 INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY 399, 402 (H. Lauterpacht ed., 7th ed. 1952) (observing that "moveable enemy public property may certainly be appropriated by a belligerent, provided that it can directly or indirectly be useful for military operations" and "such property may be appropriated, whether it can be used for military operations or not"); H. A. Smith, *Booty of War*, 23 BRIT. Y.B. INT'L L. 227, 228-29 (1946) (stating that based on Hague Regulations article 53, an army can seize war materials covering almost the entire range of ordinary commerce).

According to the Hague Regulations article 53, an army of occupation can take possession of a broad array of state-owned property, including cash, funds, realizable securities, arms depots, means of transport, stores and supplies, and generally, "all movable property belonging to the State which may be used for military operations."<sup>45</sup> Stopping the analysis here though effectively gives belligerent armies carte blanche to scoop up state-owned property.

The intent of humanitarian conventions such as the Hague Convention of 1907 was not to codify a customary international law license to acquire, but rather to place constraints on property acquisition to keep it from exceeding the military purposes which justified it. Therefore article 23(g) of the Hague Regulations prohibited the seizure of any enemy property unless the seizure was "imperatively demanded by the necessities of war."<sup>46</sup> This provision made no distinction between public or private

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<sup>45</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 53, 36 Stat. at 2308. Article 53 is written in restrictive terms, stating the army "can *only* take possession of [enumerated examples]" (emphasis added). *Id.* However the categories are so broad that in practice nearly every sort of good could be encompassed, except perhaps cultural property.

<sup>46</sup> *Id.* annexed regulations art. 23(g), 36 Stat. at 2302.

property, or between acquisition on the battlefield or during military occupation.<sup>47</sup>

The trial of major war criminals following World War II reinforced the requirement of military necessity prior to acquisition of state property. The charge of "war crimes" included the "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."<sup>48</sup> The tribunal thereby established that when state-sponsored property acquisition exceeded that required to prosecute a war, liability would lie for those responsible.<sup>49</sup>

The Geneva Convention on Civilians article 33 also prohibits pillage, without further definition.<sup>50</sup> Article 147 of the same Convention defines as a "grave breach" extensive appropriation of property protected by the

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<sup>47</sup> Neither Oppenheim nor Smith discussed Hague Regulation article 23(g) as a limitation on property acquisition. To the contrary, they find the authority to seize complete if the property is capable of military usage. See sources cited *supra* note 44.

<sup>48</sup> Charter of the International Military Tribunal, *supra* note 31, art. 6(b), 59 Stat. at 1547, 82 U.N.T.S. at 288. It is not clear from the structure of article 6(b) whether the carve-out for military necessity applied to devastation only, devastation and destruction, or devastation, destruction, and plunder. But the term "plunder" already contains a pejorative conclusion that the taking was not justified by any legitimate rationale, such as military necessity. *Black's Law Dictionary* defines "plunder" as "[t]he forcible seizure of another's property, esp. in war; esp., the wartime plundering of a city or territory." BLACK'S LAW DICTIONARY 1176 (Bryan A. Garner ed., 7th ed. 1999) (referring to "pillage" at page 1168, which has the same definition).

<sup>49</sup> The Tribunal believed that the offenses charged represented international law existing at the time of the creation of the Charter of the International Military Tribunal, as derived from conventions and customary international law, including the Hague Convention of 1907. See *The Nuremberg Trial*, 6 F.R.D. 69, 107 (Int'l Mil. Trib. 1946) ("The Charter is not an arbitrary exercise of power on the part of victorious nations, but...the expression of international law existing at the time of its creation...").

<sup>50</sup> See *Geneva Conventions-Civilians*, *supra* note 32, art. 33, 6 U.S.T. at 3538-40, 75 U.N.T.S. at 308-10.

Convention unjustified by military necessity.<sup>51</sup> Protocol I to the Geneva Conventions of 1949 reinforces the prerequisite of military necessity with its innovative distinction between military objectives and civilian objects. Military objectives are defined as those objects that make a contribution to the military action; all other objects are considered "civilian objects" to be protected, regardless of ownership.<sup>52</sup> At some point excessive acquisition of even public property without military necessity can get characterized as plunder or pillage, leading to liability for violation of *jus in bello* rules.<sup>53</sup>

While from a legal standpoint military necessity overlays the acquisition of public property in war, in practice military necessity may not be that difficult to manufacture. Two legitimate motivations for seizing public property include making use of the property to prosecute

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<sup>51</sup> See *id.* art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

<sup>52</sup> See Geneva Conventions Protocol I, *supra* note 38, art. 52, 1125 U.N.T.S. at 27. Protocol I requires that civilian objects not be the object of "attack or reprisals." *Id.* One might argue seizure is not encompassed within these prohibitions. However when viewed in light of the Hague Convention of 1907 and the Nuremberg precedent, it appears that seizure unjustified by military necessity runs the risk of condemnation as plunder.

<sup>53</sup> See Aarmin A. Steinkamm, *Pillage*, in 3 ENCYCLOPEDIA OF INTERNATIONAL LAW 1029, 1030 (Rudolph Bernhardt ed., 1992) ("The prohibition of pillage in Article 33 of Geneva Convention IV applies to the entire territory of the parties involved in the conflict and to any person, without restriction. Its applicability is so far-reaching and absolute as also to cover officially authorized or ordered forms of plundering when the appropriation of property, private or public, is not 'imperatively demanded' by military necessity, and is carried out on a large scale in an illegal and arbitrary manner.").

the war and denying use of property by the enemy.<sup>54</sup> The tipping point where the international community becomes convinced that acquisition of public property has exceeded military necessity and crossed into national enrichment will likely not be easily met.<sup>55</sup> One key indicator of property acquisition run amok may be the degree to which public property is exported from the occupied state. While not per se prohibited, export facially looks like national enrichment, and runs contrary to the spirit of other Hague Regulations such as article 52 on requisitions,<sup>56</sup> or the strict policies against exporting cultural property.<sup>57</sup>

The preceding discussion regarding seizure of public property also applies to the produce of capital assets of the enemy state. Hague Regulation article 55 requires occupying powers to act as stewards of the natural resources belonging to an occupied state.<sup>58</sup> The capital of "public buildings, real estate, forests, and agricultural estates" must be safeguarded and administered in accordance

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<sup>54</sup> Seizing the enemy's property and using it against him derives from the classic law of war principle that "war must support war"—i.e. the enemy should be made to pay the cost of the war. See Oppenheim, *supra* note 44, at 408.

<sup>55</sup> Whether that tipping point is ever found might also depend on who wins the war and on the *jus ad bellum* justification for going to war in the first place. See Parts III and IV, *infra*. The scale of the conflict may also be a determinative factor. During a global conflict like World War II when the allies fought to liberate occupied Europe from the Germans, who had themselves fully mobilized the assets of the occupied territories to support their war machine, there appeared to be a high tolerance for property reacquisition by the allies as they seized and disposed of anything touched by Germany. See Smith, *supra* note 44, *passim*.

<sup>56</sup> See Part II.B.2.b(1) *infra* on private property.

<sup>57</sup> See Part II.B.3.c(1) *infra* on cultural property.

<sup>58</sup> See Hague Convention of 1907, *supra* note 26, annexed regulations art. 55, 36 Stat. at 2309.

with the rules of usufruct.<sup>59</sup> Usufructuaries are held liable for waste or destruction resulting from the use of such resources.<sup>60</sup> However occupying powers can make use of the produce of the land, subject to military necessity and the needs of the civilian population, discussed in the next section.<sup>61</sup>

#### **II.B.1.b(2). Belligerents May Not Threaten the Survival of Civilian Populations Through Property Acquisition**

The preceding section establishes that an armed force must have a military necessity prior to taking the public property of another state. The Geneva Convention on Civilians and Protocol I to the Geneva Conventions further constrain the taking of property critical to the survival of a civilian population.

The Geneva Convention on Civilians limits the requisitioning of food, medical supplies, and other articles in occupied territory.<sup>62</sup> These items may only be

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<sup>59</sup> *Id.*

<sup>60</sup> See Green, *supra* note 38, at 251. *Black's Law Dictionary* defines "usufruct" as a "right to use another's property for a time without damaging or diminishing it, although the property might naturally deteriorate over time." BLACK'S LAW DICTIONARY, *supra* note 48, at 1542.

<sup>61</sup> See Oppenheim, *supra* note 44, at 397; FM 27-10, *supra* note 2, ¶¶ 400, 402.

<sup>62</sup> Geneva Convention-Civilians, *supra* note 32, art. 55, 6 U.S.T. at 3552-54, 75 U.N.T.S. at 322-24 ("The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid

used by "occupation forces and administrative personnel," and then "only if the requirements of the civilian population have been taken into account."<sup>63</sup> Protocol I expands the illustrative list of indispensable property to include food, crops, livestock, drinking water installations and supplies and irrigation works.<sup>64</sup> These items may only be removed by an adverse party provided they are to be used as sustenance solely for members of the armed forces or in direct support of military action.<sup>65</sup> Similar protection is granted to the buildings and material used by medical units,<sup>66</sup> civil defense organizations,<sup>67</sup> and hospitals.<sup>68</sup>

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for any requisitioned goods."). The Convention does not define what "other articles" might include, although in context they should be limited to property essential to the survival of the civilian population. This conclusion is supported by Protocol I, which focuses upon property "indispensable to the survival of the civilian population." Geneva Conventions Protocol I, *supra* note 38, art. 54, 1125 U.N.T.S. at 27-28.

The Geneva Convention on Civilians uses the term "requisition" which ordinarily applies to seizure of private property, but the restriction would be equally appropriate for state-owned property. Geneva Conventions Protocol I does not use the term "requisition," but instead uses "remove" which would apply to the types of property covered regardless of ownership.

<sup>63</sup> Geneva Convention-Civilians, *supra* note 32, art. 55, 6 U.S.T. at 3552-54, 75 U.N.T.S. at 322-24. In fact, if resources in the occupied territories are inadequate, the occupying power is obligated to import resources. *Id.* If these resources are privately owned, then a duty of compensation also arises for requisitioned property. *Id.*

<sup>64</sup> Geneva Conventions Protocol I, *supra* note 38, art. 54, 1125 U.N.T.S. at 27-28.

<sup>65</sup> *Id.* This usage may not leave the civilian population with inadequate food or water however. *Id.* Oddly Protocol I does let the government of the territory under attack employ scorched earth operations if it believes such action are required by imperative military necessity. *Id.*

<sup>66</sup> *Id.* art. 14, 1125 U.N.T.S. at 13.

<sup>67</sup> See *id.* arts. 63, 1125 U.N.T.S. at 32-33 (restricting use of civil defense material to support of the civilian population) & 67, 1125 U.N.T.S. at 34-35 (restricting diversion of military equipment assigned to civil defense organizations to situations involving imperative military necessity or if the needs of the civilian population are otherwise covered).

<sup>68</sup> See, e.g., Geneva Convention-Civilians, *supra* note 32, art. 57, 6 U.S.T. at 3554, 75 U.N.T.S. at 324 ("The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.").



## II.B.1.c. Title Transfer and the Acquisition of Public Property

Conventions and scholarly works on property acquisition use a plethora of terms to describe a state forming some type of possessory relationship with property, including "seize," "capture," "appropriate," "sequester," "requisition," "control," and "confiscate."<sup>69</sup> Unfortunately it is often unclear whether title to the property passes to the acquiring state, or whether a temporary status has arisen implying that rights with regard to the property continue with the original owner. Understanding the nature of a state's acquired interest is critical not only to deciding whether a *jus in bello* or *jus ad bellum* norm has been violated, but also to formulating arguments to change the nature of the interest acquired as a means of further constraining property acquisition in war. Thus for each of the three categories of property discussed in this paper—public, private, and cultural—there will be a brief section addressing title transfer.

The first step a belligerent state takes with regard to public property is to seize it; in other words, to

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<sup>69</sup> In this paper I have chosen "property acquisition" to avoid extraneous meanings associated with other terminology. For the purposes of this paper, "property acquisition" means that the acquiring state has taken title to the property.

intend to appropriate and exercise control over the property.<sup>70</sup> In the arena of prize law, the seizure would not form an ultimate determination as to ownership. Instead the property would go before an adjudicatory body such as a prize court and either be condemned, in which case title would transfer, or restored to the original owner.<sup>71</sup> With land warfare however, there is no tradition of deciding title transfer in a formal adjudicative setting. Instead the commander in the field makes the decision to affirmatively appropriate the property and title transfers to the capturing state at that point.<sup>72</sup>

Once title transfers the capturing state is technically free to dispose of the enemy property as it sees fit.<sup>73</sup> However as discussed in the preceding section, excessive seizures unjustified by military necessity could open a state up to *jus in bello* charges of plunder. And *jus ad bellum* concerns provide further overarching

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<sup>70</sup> See, e.g., BLACK'S LAW DICTIONARY, *supra* note 48, at 1363 (defining "seize" as "to forcibly take possession" of a person or property); FM 27-10, *supra* note 2, ¶ 395 (observing that title is not automatically vested in an occupying power, that state must affirmatively take steps to appropriate enemy property).

<sup>71</sup> See TOMAN, *supra* note 2, at 169-70 & 172 n.2 (noting that with regard to enemy material, "capture" is often used as a synonym as a right to booty, which results in the acquiring of ownership with no obligation in regard to restitution or compensation). This paper does not deal with the separate body of law governing the right of prize.

<sup>72</sup> See Smith, *supra* note 44, at 277 (observing that the law of booty is almost unwritten as compared to the law of prize, because questions of prize have generally been decided by courts of law, whereas questions of booty are decided by commanders in the field in unrecorded decisions). *But see* discussion regarding military operations other than war note 104 *infra*.

<sup>73</sup> Title passes to the capturing state. See U.S. CONST. art. I, § 8, cl. 11; 50 U.S.C. § 2204(4) (2004); FM 27-10, *supra* note 2, ¶ 396; Oppenheim, *supra* note 44, at 402 ("To whom the booty ultimately belongs is not for International but for Municipal Law to determine, since International Law simply states that public enemy property on the battlefield may be appropriated by belligerents.").

constraints on a state's ability to use the captured property for its own enrichment.<sup>74</sup>

## **II.B.2. Private Property**

### **II.B.2.a. Overview**

According to the former law of nations, private movable property could be seized equally with public movable property as the booty of war.<sup>75</sup> However this is no longer true.<sup>76</sup> International conventions seek to protect private property as part of a general effort to shield noncombatants from the effects of war and restrain armies from wholesale looting. Private property also qualifying as cultural property gains additional protection from the more restrictive rules for cultural property, discussed in Part II.B.3 below.<sup>77</sup>

The laws of armed conflict recognize that an armed force may need to use private property to meet the exigencies of war. When the prerequisite of military necessity is met, an armed force may seize or requisition

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<sup>74</sup> See Parts III and IV *infra*.

<sup>75</sup> See, e.g., Oppenheim, *supra* note 44, at 401.

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., Hague Convention of 1954, *supra* note 34, art. 1, 249 U.N.T.S. at 242 (defining cultural property for purposes of the Convention "irrespective of origin or ownership").

private property and put it to use. Whether seized or requisitioned, the private owner is entitled to either compensation or return of the property, no later than the conclusion of the war.

As with public property, we will first canvass customary and conventional restrictions on the acquisition of private property, before addressing the issue of title transfer. Despite the increased restrictions on acquiring private property, it can still be done with relative ease. Thus *jus ad bellum* considerations will again provide an overarching constraint on the acquisition of private property—the subject of Parts III and IV below.

#### **II.B.2.b. Prohibitions Related to Acquisition of Private Property**

##### **II.B.2.b(1). Belligerents May Not Acquire Private Property Without Military Necessity and Compensation**

The Hague Regulations first lay down a basic rule that “private property cannot be confiscated.”<sup>78</sup> Two important

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<sup>78</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 46, 36 Stat. at 2306 (“Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property can not be confiscated.”). “Confiscation” is not defined by the Hague Regulations. Armin Steinkamm considers confiscation to include “the expropriation without indemnification of private property by a unilateral act of sovereignty not justified by military necessity on

exceptions exist for material usable in war however.

First, privately-owned war material may be seized provided that it is restored and compensation fixed when the peace is made.<sup>79</sup> Second, materials needed by the army of occupation may be requisitioned by demanding the property and paying cash on the spot, or as soon as possible thereafter.<sup>80</sup> In either case, the private property owner is entitled to receive compensation for the use of their property, and possibly the property back.<sup>81</sup>

Just as with public property, seizures of private property must be "imperatively demanded by the necessities of war."<sup>82</sup> The military will typically either need to deny use of the property to the enemy or to make use of the

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the part of an occupying power, and its incorporation into the national property of that power." Steinkamm, *supra* note 53, at 1030.

<sup>79</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 53, 36 Stat. at 2308 ("All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and generally, all kinds of munitions of war, may be seized, even if they do not belong to private individuals, but must be restored and compensation fixed when peace is made."). Smith condenses article 53's illustrative list into a broad category of "war material" which he asserts covers "all movable articles for which a modern army can find any normal use." Smith, *supra* note 44, at 228; *see also* FM 27-10, *supra* note 2, ¶ 404 ("Under modern conditions of warfare, a large proportion of State property may be regarded as capable of being used for military purposes.").

<sup>80</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 52, 36 Stat. at 2308 ("Requisitions in kind...shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and...shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.").

<sup>81</sup> *See* discussion on title transfer in Part II.B.1.c *infra*.

<sup>82</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 23(g), 36 Stat. at 2302. Article 23(g) makes no distinction based on whether the property is publicly or privately owned. If the property is not capable of being used for the needs of the army, its seizure may be regarded as pillage. *See* Green Haywood Hackworth, 6 DIGEST OF INTERNATIONAL LAW 403 (1940) (citing the Italian case of *Mazzoni c. Finanze dello Stato*, 52 Il Foro Italiano 960 (Tribunale di Venezia 1927), *translated and digested in* ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES, 1927-28, at 564-65 (1931)).

property. Military necessity is also required for requisitions, since excessive requisitioning may conceal a program of pillage. Requisitioning armies must take into consideration the needs of the populace, and may only requisition to support the needs of an army of occupation.<sup>83</sup>

The Hague Regulations prohibit "pillage" without definition.<sup>84</sup> Presumably this could pick up both pillage as the acquisition of private property by an individual soldier for personal enrichment, as well as pillage in the sense of a state-sponsored campaign to acquire private property without military justification.<sup>85</sup>

The Nuremberg Tribunals following World War II reinforced the Hague Convention of 1907 by holding high-level German officials accountable for war crimes, which included the "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."<sup>86</sup> The tribunal's

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<sup>83</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 52, 2308; *see also* Geneva Convention-Civilians, *supra* note 32, art. 55, 6 U.S.T. at 3552-54, 75 U.N.T.S. at 322-24; text accompanying notes 62-65 *supra*. Smith finds the restrictions of article 52 archaic given the integration between the home front and war machine, especially as demonstrated by the Germans in World War II. *See* Smith, *supra* note 44, at 227 ("[I]t is quite impossible under modern conditions to draw a logical line between the needs of the occupying force and the vast organization upon which they depend.").

<sup>84</sup> *See* Hague Convention of 1907, *supra* note 26, annexed regulations arts. 28, 36 Stat. at 2303 ("The pillage of a town or place, even when taken by assault, is prohibited.") & 47, 36 Stat. at 2307 ("Pillage is formally forbidden."). The *American Heritage Dictionary* defines "pillage" as "to rob of goods by force, esp. in times of war; plunder," and "to take spoils by force." AMERICAN HERITAGE DICTIONARY 940 (2d ed. 1985).

<sup>85</sup> *See* Steinkamm, *supra* note 53, at 1029.

<sup>86</sup> Charter of the International Military Tribunal, *supra* note 31, art. 6(b), 59 Stat. at 1547, 82 U.N.T.S. at 266.

written judgment gave further definition to "plunder" as a form of wide-scale unjustified enrichment when it observed "public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe."<sup>87</sup>

The "pillage" of property possessed by protected persons,<sup>88</sup> the shipwrecked, killed and wounded,<sup>89</sup> or civilian detainees<sup>90</sup> is prohibited by the Geneva Convention on Civilians. The non-military personal property of prisoners of war is also protected, not only by the Hague Convention of 1907,<sup>91</sup> but also by the Geneva Convention on Prisoners of War.<sup>92</sup> The Geneva Convention on Civilians lays the

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<sup>87</sup> *The Nurnberg Trial*, 6 F.R.D. at 113. *See id.* at 120-23 (describing Germany's method of pillage and plunder).

<sup>88</sup> Geneva Convention-Civilians, *supra* note 32, art. 33, 6 U.S.T. at 3538-40, 75 U.N.T.S. at 308-10 ("Pillage is prohibited."). Article 4 of the Geneva Convention on Civilians defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *Id.* art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290. Some people will not be included within "protected persons" for the purpose of the Convention, including (1) nationals of a state not bound by the Convention, (2) nationals of neutral states or co-belligerent states if their state of nationality still has normal diplomatic representation in the state in whose hands they are, and (3) persons protected by the other three Geneva Conventions of 1949. *Id.*

<sup>89</sup> *Id.* art. 16, 6 U.S.T. at 3528, 75 U.N.T.S. at 298 (requiring parties to protect the shipwrecked, wounded, and others exposed to great danger from pillage and ill-treatment). The wounded and sick are separately protected against pillage and despoilment by the Geneva Convention on the Wounded and Sick. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, art. 15, 6 U.S.T. 3114, 3124-26, 75 U.N.T.S. 31, 40-42 [hereinafter Geneva Convention-Wounded and Sick].

<sup>90</sup> Geneva Convention-Civilians, *supra* note 32, art. 97, 6 U.S.T. at 3582, 75 U.N.T.S. at 352 (discussing the proper disposition of internee's property).

<sup>91</sup> *See* Hague Convention of 1907, *supra* note 26, annexed regulations arts. 4, 36 Stat. at 2296 ("All [POW's] personal belongings, except arms, horses, and military papers, remain their property") & 14, 36 Stat. at 2299-2300 (establishing an inquiry office to collect and forward to their proper owners all objects of personal use, valuables, letters, etc. found on the battlefield or left behind by prisoners).

<sup>92</sup> *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 18, 6 U.S.T. 3316, 3332-34, 75 U.N.T.S. 135, 150-52 [hereinafter Geneva Convention-POWs]. The same is true for

predicate for future war crimes trials of violators, by defining the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" as a "grave breach."<sup>93</sup> In 1977, Protocol II to the Geneva Conventions extended the prohibition against pillage to non-international armed conflicts.<sup>94</sup>

#### **II.B.2.b(2). Reprisals Against Private Property Are Prohibited**

The Geneva Convention on Civilians prohibits "reprisals against protected persons and their property."<sup>95</sup> In the property acquisition arena, this should foreclose arguments attempting to justify tit for tat plundering.

#### **II.B.2.c. Title Transfer and the Acquisition of Private Property**

The status of title when a belligerent state acquires private property is not as clear-cut as with public

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retained medical personnel. See Geneva Convention-Wounded and Sick, *supra* note 89, art. 32, 6 U.S.T. at 3136, 75 U.N.T.S. at 52.

<sup>93</sup> Geneva Conventions-Civilians, *supra* note 32, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

<sup>94</sup> Geneva Conventions Protocol II, *supra* note 39, art. 4.2(a), 1125 U.N.T.S. at 612.

<sup>95</sup> Geneva Conventions-Civilians, *supra* note 32, art. 33, 6 U.S.T. at 3538-40, 75 U.N.T.S. at 308-10; see also Geneva Conventions Protocol I, *supra* note 38, art. 54, 1125 U.N.T.S. at 27-28 (same).



property. This section will identify differing approaches concerning both seizure and requisition, before concluding that the most practical approach holds that title transfers once a belligerent state seizes or demands possession of privately-owned militarily-usable property.

### **II.B.2.c(1) Requisition**

Requisitioning clearly envisions a transfer of title in the property requisitioned to the belligerent state.<sup>96</sup> However the requisitioning state must either pay cash immediately, or give a receipt and pay "as soon as possible."<sup>97</sup> One point of contention is whether title transfers to a requisitioning state that has not yet paid for the material. The better answer holds title does transfer upon demand, permitting the requisitioning state to pass good title to third parties and avoid a muddled claims situation.<sup>98</sup> The private party still possesses a claim against the requisitioning state for compensation.

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<sup>96</sup> *Black's Law Dictionary* defines "requisition" as an "authoritative formal demand" or a "governmental seizure of property." BLACK'S LAW DICTIONARY, *supra* note 48, at 1307.

<sup>97</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 52, 36 Stat. at 2308.

<sup>98</sup> The Allied armies in World War II considered any property that Germany had taken possession of within its occupied territories to have been requisitioned or seized, regardless of whether Germany had actually paid for the materials. Title having transferred to the German State, the property was considered public property subject to seizure without compensation. That said, if an individual property owner within the occupied state could prove that the allegedly requisitioned property had not yet been paid for, in some instances the property was returned to that owner or that owner was permitted a claim for compensation against the Allies if they still chose to seize it. This was considered a waiver of rights by the Allies, not a

## II.B.2.c(2) Seizure

At what point title to private property transfers to the belligerent state seizing it appears to be the subject of two distinct approaches. One view treats seizure as automatically vesting title, while the other treats seizure as establishing temporary property control pending later resolution on disposition.

The immediate title transfer approach treats all property captured on the battlefield the same, whether public or private. The difference is that if the seized property is privately owned, an obligation simultaneously arises for the seizing power to compensate and restore the property at the conclusion of the conflict.<sup>99</sup> Since title is deemed to have transferred, compensation is the more probable resolution. The transaction is treated like an *ex post facto* requisition. This approach reflects the fact that junior officers on the ground making property decisions will not have the time or resources to

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legal requirement, since "it is clear that goods requisitioned by the enemy in occupied territory become enemy property, whether they have been paid for or not." See Smith, *supra* note 44, at 234 & 238-239.

<sup>99</sup> Seizure falls under article 53(2) of the Hague Regulations. See Hague Convention of 1907, annexed regulations, *supra* note 26, art. 53(2), 36 Stat. at 2308. Note that article 53(2) technically only addresses seizure in the course of a military occupation, not a battlefield seizure. But article 53(2) has been extended by analogy to battlefield seizures. See, e.g., Smith, *supra* note 44, at 228; Oppenheim, *supra* note 44, at 404; FM 27-10, *supra* note 2, ¶ 59.b (referring the reader to the rules on seizing private property in occupied territory for seizures of booty "found on a battlefield"). Article 53(2) says nothing about giving a receipt, but logically one should be given if possible to substantiate the owner's claim.

substantiate and verify ownership claims. Therefore claims are put off until the resolution of the conflict, which also has the dubious advantage of allowing a victorious belligerent to absolve itself of responsibility by the terms of a peace treaty. According to H.A. Smith, this was the approach used by Allied forces in World War II as they recaptured occupied Europe.<sup>100</sup>

The second approach views seizure as a decision to take temporary control of private property subject to a later decision on disposition.<sup>101</sup> The property is sequestered, subject to later requisitioning (title transfer) or restitution with indemnities paid (no title transfer).<sup>102</sup> The U.S. Army's field manual on the *Law of Land Warfare* offers the "property control" approach as one option to prevent hostile use of property within an occupied territory, however other options such as seizure and requisition are still available if necessary and

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<sup>100</sup> See Smith, *supra* note 44, at 228-29, 231. Smith writes "in time of war the distinction between public and private property ceases to have any real meaning. The purpose of the law of booty is to enable a belligerent to take possession of all property which his enemy can make use of....The question of compensation, if compensation is due, is merely a question of accountancy, and this, under the Hague Rules (Article 53), need not be settled until after the war." *Id.* at 231.

<sup>101</sup> This approach is closer to the naval context, which follows capture with subsequent adjudication by a prize court. Jiri Toman describes this concept as follows: "The kind of seizure described in Article 53, paragraph 2 [of the Hague Regulations], does not give the Occupying Power the right of ownership but neither does it constitute simple sequestration; it is an act of possession which is no obstacle to requisition as regulated by Article 52." TOMAN, *supra* note 2, at 169.

<sup>102</sup> *Id.* 169-70 (citing 1 THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY 279 (Jean S. Pictet ed. 1952)). Treating the seizure as temporary places more emphasis on returning the property to its owner when no longer needed, which could be much sooner than the end of the conflict. See OPERATIONAL LAW HANDBOOK 250 (William O'Brien ed., 2003).

authorized by international law.<sup>103</sup> This approach may also be prudent during lower level operations involving military forces, such as consensual interventions by one state into another state to assist in restoring the peace.<sup>104</sup>

Either approach appears consonant with the laws of war, although taking immediate title offers greater flexibility to commanders in the field.<sup>105</sup> However this flexibility may exacerbate the Achilles heel of private property seizure: compensation. The Hague Regulations were

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<sup>103</sup> FM 27-10, *supra* note 2, ¶ 399.

<sup>104</sup> Cf. THE CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES 146 (2001) (stating that in operations other than war "property recovered from the host nation does not become the property of the seizing government"); OPERATIONAL LAW HANDBOOK, *supra* note 102, at 251 (stating that if U.S. forces are invited in there is no right to take property because the law of war and its property rules have not been triggered).

Even when the body of law commonly called the "Law of War" or "Law of Armed Conflict" is considered not to be in force, military forces generally operate by analogy to the rules as they correspond to similar situations. See DEP'T DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, ¶ 5.3.1 (Dec. 9, 1998) (requiring members of the armed forces comply with the law of war during all armed conflicts, however characterized, and with the principles of the law of war during all other operations); cf. Geneva Convention-Civilians, *supra* note 32, art. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288 (triggering application of the Convention in the event of declared war or "any other armed conflict" arising between two or more contracting parties).

In a consensual entry into a state, military forces will be authorized to seize public and private property if military necessity exists. See e.g. THE CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 312-13(1995) (containing the U.S. Joint Task Force "General Order Number 1" for military and civilian personnel in Haiti, which dictated that "private property may be seized during combat only on order of a commander based on military necessity" and "public property captured by U.S. personnel is the property of the U.S.") & 322-24 (containing a similar order for U.N. forces after the United Nations took control of operations in Haiti, except that property seized became the property of the United Nations). However if the host state is in existence during a consensual entry, then seized public property may continue to be considered the property of that state. See *id.* at 129 (stating that Haitian public property in United States possession remained Haitian public property, unless sold through the weapons buyback program). Likewise responsibility for holding, returning, or compensating individuals for privately owned property may remain with host state authorities, if they are capable of safeguarding military material without allowing it to be misused or diverted. In this respect, the intervening forces could be viewed as agents of the host state.

<sup>105</sup> See Rudolf Dolzer, *Requisitions*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 205, 206 (Rudolf Bernhardt ed. 1992) ("With respect to movables, it is generally assumed that it is in the discretion of the occupant State whether it wants to acquire title to the property or whether it assumes only temporary control.").

designed to ensure the state, not the individual, bore the cost of warfare. But both requisitioning and seizure permit belligerents to seize now and pay later, leaving the property owner with a thin promise to pay where valuable goods once stood. Frequently deferring compensation until peace is made results in liability for compensation being shifted to the defeated party by the terms of the treaty.<sup>106</sup> The private property owner theoretically has a claim against his defeated state, but the obligation to compensate ceases to be an international matter, and is instead a domestic issue within that state.<sup>107</sup> With this perspective, it becomes easier to see how requisition and seizure can mask plunder, because the party passing out receipts for property taken may have no intention of ending up with the responsibility to honor them at the conclusion of the conflict.<sup>108</sup>

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<sup>106</sup> See Ignaz Seidl-Hohenveldern, *Enemy Property*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 87, 89 (Rudolf Bernhardt ed. 1992) ("[R]ecent peace treaties have excluded any claim on this account against the victorious side. These treaties impose on the defeated State a duty to indemnify its own nationals."); Dolzer, *supra* note 105, at 208.

<sup>107</sup> See Dolzer, *supra* note 105, at 208 (observing that shifting liability to the defeated state on the international level does not necessarily compel the occupied state to compensate affected inhabitants).

<sup>108</sup> See *id.* (noting that during World War II, receipts for requisitions sometimes covered up instances of pillage). Another major loophole allowing the requisitioning power to shift the burden of war back onto the occupied populace is the power to levy contributions for the needs of the army or the administration of the territory in question. See Hague Convention of 1907, *supra* note 26, annexed regulations arts. 48, 49, and 51, 36 Stat. at 2307. The contributions can then be used to pay the inhabitants for requisitioned items. See *OPERATIONAL LAW HANDBOOK*, *supra* note 102, at 251. The Nuremberg Tribunal found that German authorities maintained the "pretense of paying for all the property which they seized" to disguise the fact that goods sent to Germany from occupied countries were paid for by the occupied countries themselves. *The Nurnberg Trial*, 6 F.R.D. at 121-22. The Germans either exaggerated the cost of the occupation, or extracted forced loans in return for a credit balance on a "clearing account" which was an account "merely in name." *Id.*

### II.B.3. Cultural Property

#### II.B.3.a. Cultural Property Defined

Before identifying *jus in bello* prohibitions against the acquisition of cultural property in war, it is necessary to determine what "cultural property" encompasses. Three key conventions over the past 100 years have fleshed out the types of property covered: the Hague Convention of 1907, the Hague Convention of 1954 with its two Protocols, and the UNESCO Convention of 1970.

Article 56 of Hague Regulations addressed what later became known as cultural property by carving out protections for the property of municipalities, religious, charitable, educational, artistic and scientific institutes, historic monuments, and works of art and science.<sup>109</sup> The preamble to the Hague Convention of 1954 recognized that in light of the grave damage inflicted on cultural property during the two world wars, further

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<sup>109</sup> Article 53 states:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and shall be made the subject of legal proceedings.

protections were required.<sup>110</sup> One significant change was to expand the scope of cultural property to cover movable property of great importance to the cultural heritage of all people, in categories such as architecture, art, history, science, books, archives, manuscripts, and archeological relics, whether scientific or secular.<sup>111</sup> The categories in the Hague Convention are meant to be descriptive, not all-inclusive.<sup>112</sup>

The UNESCO Convention of 1970 does not focus on armed conflict, but rather upon "illicit" importing, exporting, and transferring of cultural property in peacetime.<sup>113</sup> Nonetheless this convention provides an elaborate list of eleven categories of movable property under the banner "cultural property."<sup>114</sup> There is no reason to suppose that

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Hague Convention of 1907, *supra* note 26, annexed regulations art. 56, 36 Stat. at 2309.

<sup>110</sup> See Hague Convention of 1954, *supra* note 34, pmbl., 249 U.N.T.S. at 240.

<sup>111</sup> Article 1 states:

Article 1. Definition of cultural property. For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historic or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) [buildings such as museums, libraries, and refuges];
- (c) [centers containing large amounts of cultural property as defined in (a) and (b)].

*Id.* art. 1, 249 U.N.T.S. at 242.

<sup>112</sup> This is indicated by the use of "such as" to enumerate descriptive categories of property of "great importance to the cultural heritage of every people." See *id.*

<sup>113</sup> See, e.g., 1970 UNESCO Convention, *supra* note 35, pmbl., 10 I.L.M. at 289, 823 U.N.T.S. at 232-34.

<sup>114</sup> Article 1 reads as follows:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

the definition provided here would not inform and reinforce the definitions provided in the two Hague Conventions when issues regarding cultural property in war arise.<sup>115</sup> This is true despite the fact that the UNESCO Convention requires states to specifically designate which cultural property is protected and the fact that the UNESCO definition appears to be framed as an exhaustive, vice illustrative list. For purposes of armed conflict, property falling within the listed categories will largely qualify as protected cultural property regardless of whether a state has made

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- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
  - (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
  - (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
  - (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
  - (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
  - (f) objects of ethnological interest;
  - (g) property of artistic interest, such as:
    - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
    - (ii) original works of statuary art and sculpture in any material;
    - (iii) original engravings, prints and lithographs;
    - (iv) original artistic assemblages and montages in any material;
  - (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
  - (i) postage, revenue and similar stamps, singly or in collections;
  - (j) archives, including sound, photographic and cinematographic archives;
  - (k) articles of furniture more than one hundred years old and old musical instruments.

*Id.* art. 1, 10 I.L.M. at 289-90, 823 U.N.T.S. at 234-36. Note that the 1970 UNESCO Convention definition of cultural property was also used by the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which has not yet entered effect. See UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Jun. 24, 1995, art. 2 & annex, 34 I.L.M. 1322, 1330, 1339.

<sup>115</sup> The UNESCO Convention explicitly addresses one armed conflict scenario in article 11, where it states that "the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit." UNESCO Convention of 1970, *supra* note 35, art. 11, 10 I.L.M. at 291, 823 U.N.T.S. at 242.



specific designations for purposes of their import-export regime.

#### **II.B.3.b. Why Cultural Property Merits Special Protection in War**

More than any other category of property ripe for the taking by an avaricious enemy, cultural property is given special and near total protection from acquisition in war.<sup>116</sup> The rationale centers around several essential characteristics of cultural property, including the absence of any military rationale to take the property, its status as the heritage of all mankind, and the general presumption that cultural property should not be transferred out of its current state of stewardship without that state's consent. These are each briefly discussed below.

First, the acquisition of cultural property generally serves no military purpose, which is the touchstone for a valid military objective.<sup>117</sup> Civilian objects, which would encompass cultural property, may not be made the subject of

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<sup>116</sup> Cultural property is to receive equal or greater protection from destruction; however this paper focuses only on what property an adverse party can or cannot appropriate in war.

<sup>117</sup> See the Geneva Conventions Protocol I formulation of military objectives versus civilian objects at text accompanying note 52 *supra*.

attack or reprisals.<sup>118</sup> Both the Hague Convention of 1954 and its Second Protocol up the ante by requiring parties to have an "imperative military necessity" prior to directing an act of hostility against cultural property or using it in a manner that may expose it to damage or destruction.<sup>119</sup>

Second, cultural property is viewed as having value for all mankind, not just the current nation with custody of the object.<sup>120</sup> Therefore all parties to the conflict should seek to protect and respect cultural property as *hors de combat*—above the fray.

Third, conventions focused on the export and transfer of cultural property evince a strong preference for preserving the status quo in cultural property stewardship. For example, the preamble of the UNESCO Convention of 1970 on Illicit Import, Export and Transfer of Ownership of Cultural Property dictates that "the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit."<sup>121</sup> Cracking

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<sup>118</sup> Geneva Conventions Protocol I, *supra* note 38, art. 52.1, 1125 U.N.T.S. at 27. Protocol I, in addition to providing general protection to civilian objects, explicitly reinforces the protection of cultural property in article 53. *See id.* art. 53, 1125 U.N.T.S. at 27.

<sup>119</sup> *See* Hague Convention of 1954, *supra* note 34, art. 4.2, 249 U.N.T.S. at 244; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, arts. 6 & 7, 38 I.L.M. 769, 770-771 [hereinafter Hague Convention of 1954 Protocol II].

<sup>120</sup> *See, e.g.,* Hague Convention of 1954, *supra* note 34, pmbl., 249 U.N.T.S. at 240 ("Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes contribution to the culture of the world....").

<sup>121</sup> 1970 UNESCO Convention, *supra* note 35, art. 11, 10 I.L.M. at 291, 823 U.N.T.S. at 242.

down on "illicit" transfers is the object of the Convention, which seeks to permit states to retain complete control over cultural property departing their territory.<sup>122</sup>

Together these rules curtail legitimate acquisition of the richest booty and spoils of war. As late as World War II the German Third Reich engaged in an orchestrated campaign to strip occupied territories of their artworks and treasures. Only time will tell if this increasingly rigorous latticework of conventions will better protect cultural property in future wars.

#### **II.B.3.c. Prohibitions Related to Acquisition of Cultural Property**

##### **II.B.3.c(1). Belligerents May Not Acquire Cultural Property.**

The fundamental prohibition comes from article 56 of the regulations annexed to the Hague Convention of 1907. There seizure of what we now call cultural property is "forbidden and should be made the subject of legal

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<sup>122</sup> See *id.*, pmbl., 10 I.L.M. at 289, 823 U.N.T.S. at 232-34. To some extent this Convention reflects the "cultural nationalism" movement of the 1970s, which sought to stem the flow of cultural property from poor countries of origin to rich art market states. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 843 (1986).

proceedings."<sup>123</sup> The Hague Convention of 1954 reinforces the prohibition by requiring states to "prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation" of cultural property.<sup>124</sup> The "seizure" prohibited by the Hague Convention likely refers to capture with the intent to permanently appropriate, vice temporary sequestration.<sup>125</sup>

The above prohibitions could be considered restrictions upon misbehavior by subordinates of a state, not upon acquisition of cultural property by the state itself as spoils of war. However when viewed in the light of the Nuremburg Tribunals after World War II, which included within the definition of war crimes the "plunder of public or private property," the better conclusion is that the prohibition against seizure in the Hague Conventions is focused upon the state as well as agents of the state.<sup>126</sup>

This conclusion is reinforced by separate provisions prohibiting occupying states from removing cultural

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<sup>123</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 56, 36 Stat. at 2309.

<sup>124</sup> Hague Convention of 1954, *supra* note 34, art. 4, 249 U.N.T.S. at 242-44. The Second Protocol to the Hague Convention of 1954 adds a prohibition against "extensive appropriation" of protected cultural property, which might be more appropriately leveled against states, though liability is clearly individual. See Hague Convention of 1954 Protocol II, *supra* note 119, art. 15.1.c., 38 I.L.M. at 774.

<sup>125</sup> There may be some situations in which an invading or occupying power needs to seize cultural property to protect it in line with obligations under the Hague Convention of 1954. This seizure should be viewed as a temporary sequestration followed by return when the threat has subsided. See discussion on title transfer in Part II.B.3.d. *infra*.

<sup>126</sup> See Charter of the International Military Tribunal, *supra* note 31, art. 6(b), 59 Stat. at 1547, 82 U.N.T.S. at 288.

property from the state occupied.<sup>127</sup> Protocol I to the Hague Convention of 1954, executed at the same time as the Convention, requires states to "prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property..."<sup>128</sup> This prohibition is echoed by the UNESCO Convention of 1970, which defines the export or transfer of ownership under compulsion arising from enemy occupation as illicit.<sup>129</sup> Protocol II to the Hague Convention of 1954, opened for signature in 1999 but not yet in force, reinforces the prohibition against illicit transfers of cultural property out of occupied territories.<sup>130</sup> States are required to punish violations under their domestic law and they may also be subject to international consequences, including a duty to provide "reparations."<sup>131</sup>

The Hague Convention of 1954 also protects cultural property under transport from "seizure, placing in prize,

<sup>127</sup> Note that exceptions exist for temporary removal of cultural property for purposes of protecting it from damage. See text accompanying note 151 *infra*.

<sup>128</sup> Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, ¶ 1, 249 U.N.T.S. 358 [hereinafter Hague Convention of 1954 Protocol I]. Paragraph 3 of Protocol I requires states to return property removed in violation of paragraph 1 at the close of hostilities. *Id.* ¶ 3, 249 U.N.T.S. at 358.

<sup>129</sup> 1970 UNESCO Convention, *supra* note 35, art. 11, 10 I.L.M. at 291, 823 U.N.T.S. at 242.

<sup>130</sup> See Hague Convention of 1954 Protocol II, *supra* note 119, art. 9, 38 I.L.M. at 771. This protocol defines "illicit" as "under compulsion or otherwise in violation of the applicable rules of domestic law of the occupied territory or of international law." *Id.* art. 1(g), 38 I.L.M. at 769. This definition appears to be a combination of the 1970 UNESCO Convention's prohibition against transfers under compulsion from occupied territories and a catchall to sweep in other sources of law in the event of a loophole. Cf. 1970 UNESCO Convention, *supra* note 35, art. 11, 10 I.L.M. at 291, 823 U.N.T.S. at 242.

<sup>131</sup> See Hague Convention of 1954 Protocol II, *supra* note 119, arts. 9, 15 & 38, 38 I.L.M. at 771, 774, & 780. Reparations might be appropriate in the event of damaged or destroyed cultural property, otherwise restitution would seem to be the appropriate remedy.

or capture."<sup>132</sup> This protection extends to the means of transport, so long as the property is properly marked, notification is made to opposing parties, and the transport is exclusively used for this purpose.<sup>133</sup>

### **II.B.3.c(2). Belligerents May Not Requisition Cultural Property**

Requisitioning generally refers to a situation where an armed force has a military requirement to make use of private property, and then either returns it or pays compensation when the property is no longer needed.<sup>134</sup> The Hague Convention of 1907 dictates that cultural property receive the same protection accorded to private property, and private property can normally be requisitioned provided military necessity exists.<sup>135</sup> Subsequent conventions have curtailed requisition of cultural property. The Hague Convention of 1954 directs parties to "refrain" from

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<sup>132</sup> Hague Convention of 1954, *supra* note 34, art. 14, 249 U.N.T.S. at 252.

<sup>133</sup> *Id.* The special rules protecting cultural property under transport raise questions as to what protection the cultural property will have absent proper markings, prior notifications, or if included in a mixed use convoy. Although convoys operating outside the guidelines are at risk of attack and destruction, should the cultural property come into the possession of the opposing party, the prohibitions regarding permanent acquisition of cultural property should continue to apply. A belligerent state discovering enemy cultural property in transit should protect it and repatriate in accordance with Hague Convention obligations (or the spirit of the Hague Conventions for non-signatories, to the extent its provisions are considered to have acquired the status of customary international law).

<sup>134</sup> See Part II.B.2.b. *supra*.

<sup>135</sup> See Hague Convention of 1907, *supra* note 26, annexed regulations arts. 52 (requisitioning) & 56 (cultural property), 36 Stat. at 2308, 2309; TOMAN, *supra* note 2, at 11 ("The property referred to in the first paragraph [of Article 56] is treated as private property and therefore liable to requisition.").

requisitioning mobile cultural property.<sup>136</sup> Protocol I to the Geneva Conventions effectively bans requisitioning of cultural property when it prohibits the use of such objects "in support of the military effort."<sup>137</sup> The very military purpose which would permit use of the property would simultaneously trigger the prohibition against putting cultural property to military use.

### **II.B.3.c(3). Reprisals Against Cultural Property Are Prohibited**

Reprisals are breaches of the laws of armed conflict conducted in response to an opponent's breach to discourage

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<sup>136</sup> Hague Convention of 1954, *supra* note 34, art. 4(3), 249 U.N.T.S. at 244. "Refrain" sounds of a voluntary self-restraint, as opposed to words of absolute prohibition like "shall not." On the other hand, unlike article 4(1) which requires parties to respect cultural property and refrain from directing acts of hostility against it, which is waivable for imperative military necessity per article 4(2), article 4(3) on requisitioning has no corresponding waiver provision for military necessity. Jiri Toman argues that there is no general reservation of military necessity in international law. Either a waiver is expressly included in the convention or it does not exist. See TOMAN, *supra* note 2, at 73. Therefore the ban on requisitioning cultural property is absolute. *Id.* at 79. Still, one can imagine rare situations where military necessity might require seizure of cultural property. For example, a private collection of antique, yet functional armaments might need to be seized to prevent their misuse by the enemy. In such a case, the waiver for imperative military necessity should cover the seizure. Considering the seizure a form of "temporary control" would allay concerns of camouflaged looting. *Cf.* discussion Part II.B.2(c)(2) *supra*.

<sup>137</sup> Geneva Conventions Protocol I, *supra* note 38, art. 53, 1125 U.N.T.S. at 27 ("Without prejudice to the provisions of the [Hague Convention of 1954], and of other relevant international instruments, it is prohibited... to use such objects in support of the military effort..."). The Hague Convention of 1954 contains similar restrictions on the use of cultural property for military purposes. In article 4.1 the parties agree to refrain from "any use of the property...for purposes which are likely to expose it to destruction or damage in the event of armed conflict." Hague Convention of 1954, *supra* note 34, art. 4.1, 249 U.N.T.S. at 242-44. Using cultural property for military purposes endangers its continued existence, since misuse will strip it of protection by giving the opposing party justification to direct acts of hostility against it. *Cf.* Hague Convention of 1907, *supra* note 26, annexed regulations art. 27, 36 Stat. at 2303 (obligating parties to spare cultural property "provided they are not being used at the time for military purposes").

further recurrence of illegal conduct.<sup>138</sup> The Hague Convention of 1954 prohibits reprisals against cultural property.<sup>139</sup> The same prohibition is echoed in the 1977 Geneva Conventions Protocol I.<sup>140</sup>

#### **II.B.3.d. Title Transfer and the Acquisition of Cultural Property**

Cultural property generally falls into the class of property which serves no military purpose; therefore, title should not transfer under the laws of war.<sup>141</sup> This conclusion can be reached by different routes. Under the Hague Regulations, cultural property is to be treated like private property, and private property cannot be confiscated.<sup>142</sup> Since cultural property generally lacks military uses, the exceptions to the general rule of non-

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<sup>138</sup> See Green, *supra* note 38, at 119 ("Reprisals are measures which are normally illegal, but are taken in response to a breach of the law by the adverse party, which breach continues after a demand for a cessation and a warning that reprisals would be taken if the prior illegal act is not terminated. They are...intended to ensure the cessation of prior illegal actions and a return to legality by the adverse party.").

<sup>139</sup> Hague Convention of 1954, *supra* note 34, art. 4.4, 249 U.N.T.S. at 244 ("[Parties] shall refrain from any act directed by way of reprisals against cultural property."). This rule is essential in the context of damage and destruction, since destroying one cultural icon in reprisal for destruction of the destruction of another would deprive the world of two irreplaceable pieces of cultural heritage. On the other hand, seizing an enemy state's cultural treasures in retaliation for their illegal seizures could gain bargaining chips with some practical value, but at the cost of the integrity of the protective regime and at potential risk to the objects themselves. Therefore the Hague Convention prohibits reprisals against cultural property.

<sup>140</sup> Geneva Conventions Protocol I, *supra* note 38, art. 53, 1125 U.N.T.S. at 27.

<sup>141</sup> Cf. FM 27-10, *supra* note 2, ¶ 404 ("[M]ovable property which is *not* susceptible of military use must be respected and cannot be appropriated.").

<sup>142</sup> See Hague Convention of 1907, *supra* note 26, annexed regulations arts. 46 & 56, 36 Stat. at 2306, 2309. Article 56 also forbids the "seizure" of cultural property. *Id.* art. 56. This use of the term seizure probably assumes title transfer.



confiscation of private property do not apply.<sup>143</sup> Likewise the Hague Convention of 1954 prohibits misappropriation of cultural property, and Protocol I to the 1954 Convention bars export from occupied territories.<sup>144</sup>

At least one United States Court has apparently taken the position that if the United States confiscates property contrary to the laws of war, title will still pass to the United States, though a claim may arise on behalf of the owner. The case, *Price v. United States*, involved four privately-owned watercolors painted by Adolph Hitler and confiscated by the U.S. Army in Germany in 1945.<sup>145</sup> The plaintiff in *Price* argued that under the U.S. Army's *Law of Land Warfare* and the Hague Convention of 1907, the United States could not take title to the paintings. Instead some other relationship like "bailment" had arisen.<sup>146</sup> The court concluded that title transferred when the United States confiscated the property.<sup>147</sup> This conclusion runs contrary

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<sup>143</sup> See discussion on seizure and requisition of private property in Part II.B.2.c *supra*.

<sup>144</sup> See discussion on seizure of cultural property in Part II.B.3.c *supra*.

<sup>145</sup> See *Price v. United States*, 69 F.3d 46, 51-52 (5th Cir. 1995), *mod'd* 81 F.3d 520 (5th Cir. 1996) (rejecting a claim for conversion lodged against the United States).

<sup>146</sup> *Id.* at 51.

<sup>147</sup> *Id.* at 52. The court did not decide whether international law had in fact been violated. See *id.* at 51 ("[W]e do not reach the issue whether these or other rules apply to the conduct of the U.S. Army in Germany during the war and occupation...."). If the confiscation was legal under the laws of war (which arguably it was—see Part IV.C.7.b. *infra* discussing ideological cultural property) then presumably the plaintiff had no case. The court does not address whether a claim for compensation arose at the time of the confiscation in 1945, or who plaintiff could pursue that claim against, or whether the claim had since expired. Even assuming the confiscation was not legal, the court believed that the illegal title transfer or conversion occurred at the time of the confiscation in Germany, therefore the plaintiff could not use a waiver to U.S. sovereign immunity to pursue his case.

to the approach that title does not pass for seized cultural property.<sup>148</sup>

*Price* could be distinguished on the basis that the paintings in question were considered "militaristic Nazi object[s]," therefore they should be treated under the seizure rules for militarily-usable private property.<sup>149</sup> It may also reflect a nationalistic desire to give the United States maximum flexibility in deciding how to dispose of seized property, especially given the passage of forty years. Cynics might argue it reflects differing rules for the victor and the vanquished.<sup>150</sup> Whatever the rationale, if the customary law of nations provides the positive permission for states to capture and take title to property, while the humanitarian conventions provide negative law on when title may not be taken, then the better approach given the sacrosanct status of cultural property may be to treat seizures as a form of bailment or sequestration vice title transfer.

Belligerent states may under some circumstances be required to seize cultural property to protect it from

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<sup>148</sup> Cf. Smith, *supra* note 44, at 235 (describing how the Allies considered movable property without any military use seized by the Germans, such as art work and valuables, as loot whose title remained vested in the original owners, not the Germans or putative third party transferees).

<sup>149</sup> See discussion on cultural property as ideological property in Part IV.C.7.b. *infra*.

<sup>150</sup> The victor's acquisitions are ratified (e.g. U.S. acquisitions after WWII); the vanquished's are reversed (e.g. German acquisitions during WWII).

harm.<sup>151</sup> These seizures are also of a temporary non-title-passing nature. As soon as the threat passes the property must be returned. Should international war crimes tribunals be established to evaluate a state's property acquisition after the war, the defense that one was only seizing property to protect it will be subjected to strict scrutiny to ensure the seizures were not in reality a campaign of looting and plunder.<sup>152</sup>

### **III. *Jus ad Bellum*: Justification for War as a Restraint on Property Acquisition in War**

#### **III.A. Overview**

The humanitarian laws of war attempted to mitigate the consequences of war, especially upon people and property not involved in the conflict. But the ultimate protection from the horrors of war would be to outlaw war altogether. This could be accomplished weakly through moral arguments directed at one's own government or world opinion, more strongly by international consensus on appropriate

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<sup>151</sup> See, e.g., Hague Convention of 1954, *supra* note 34, art. 5, 249 U.N.T.S. at 244 (discussing obligations of occupying powers to assist in the preservation of cultural property).

<sup>152</sup> See Oppenheim, *supra* note 44, at 401 (describing how the war crimes tribunals after World War II rejected Germany's claims that its seizures of art treasures, furniture, textiles, and other cultural property were done to protect and preserve the property).

behavior, and most convincingly by a corresponding international structure to enforce appropriate behavior. Although nations typically attempted to justify why their war was legitimate, it was only in the mid-twentieth century that nations of the world constructed a supranational framework that contained the promise of actually restricting recourse to force. This section will explore the philosophical and historical development of legitimizing justifications for recourse to force, before considering how the current international framework for justifying war further restricts property acquisition within war.

### **III.B. The Historical and Philosophical Development of International Law Constraining the Resort to Force**

#### **III.B.1. Legitimacy, Morality, and the Just War**

War deprives its participants of lives and property, especially for those on the losing end of a conflict. Between individuals in primitive times, such actions may have been sanctioned as an evolutionary manifestation of survival of the fittest. However as interactions between humans increased, societies were formed to collectively

defeat or defend against external parties, while simultaneously regulating behavior within the society. Thus within society killing or taking the property of others was prohibited respectively as murder and theft. This view reveals elements of natural law as well as moral influences, such as religious strictures against "killing" and "stealing."

Waging war against other societies required inflicting death and destruction that would ordinarily be forbidden. Establishing the "justness" or legitimacy of one's cause up front strengthened the resolve of combatants and noncombatants alike to inflict and endure extreme brutality.

Philosophers and apologists sought to reconcile when a war should be considered "just" to legitimize the actions of their society or discredit the behavior of their opponents. The doctrine of the just war arose during the Roman Empire. In the Roman view "every war needed justification. The best reason for going to war was the defense of frontiers, and, almost as good, pacification of the barbarians living beyond the frontiers. Outside the reasons one risked an unjust war, and emperors had to be

careful."<sup>153</sup> Saint Augustine gave the concept of just war in more spiritual terms during the Christianization of the Roman Empire.<sup>154</sup> War was to be embarked upon to punish wrongs and restore the peaceful status quo where a guilty party had refused to make amends, but no further.

St. Thomas Aquinas expanded the just war concept in the thirteenth century to include punishment of the subjective guilt of the wrongdoer, rather than the objectively wrong activity.<sup>155</sup> Thus a war could be justified if waged by the sovereign authority, for a just cause, supported by right intentions on the part of the belligerents.<sup>156</sup>

### **III.B.2. Legitimacy in the Age of Positivism**

As societies launched military actions under the banner of a just cause, other considerations came into play on the international stage. For one thing, societies, like individuals, do not relish the idea of subjugation to the will and ambition of other societies. Hence the tendency

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<sup>153</sup> Wingfield, *supra* note 6, at 114.

<sup>154</sup> See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 4 (1963). St. Augustine wrote "[j]ust wars are usually defined as those which avenge injuries, when the nation or city against which warlike action is to be directed has neglected either to punish wrongs committed by its own citizens or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God Himself ordains." *Id.* (citing *Quaestiones in Heptateuchaum*, vi. 10b).

<sup>155</sup> MALCOLM N. SHAW, *INTERNATIONAL LAW* 778 (4<sup>th</sup> ed. 1997).

<sup>156</sup> *Id.*

to build defenses or form alliances to resist the power of stronger states. Structural realists study the relations between nations coexisting in a state of anarchy to predict how such relations limit or lead to conflict. For example, a perceived aggressor risks collective resistance by other nations interested in ensuring they do not become tomorrow's target, especially as the aggressor gains additional power through conquest. These considerations are not grounded in morality, but rather practicality and survival.

The rise of European nation states and establishment of the European balance of power system following the Peace of Westphalia (1648) shifted the focus from the just war to formal processes of law.<sup>157</sup> This shift in paradigm occurred in part because of the paradox of having two Christian nations both fighting for what they both believed to be just causes.<sup>158</sup> With the rise of the nation state, states began to view recourse to war from a positivist perspective as an attribute of state sovereignty. Therefore the right to wage war in the 19th and early 20th centuries and obtain territory by right of conquest was limited less by doctrine

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<sup>157</sup> *Id.* at 779.

<sup>158</sup> *Id.* at 778-79.

than by structural concerns about maintaining the status quo and balance of power in Europe.

Nonetheless governments still had to be concerned about legitimacy on both the national and international plane. On the national level, identifying the moral justness of the cause served as propaganda, inspiring the troops and bracing the home front. The increasing devastation resulting from enhanced technology created growing public resentment against recourse to war which had to be countered.<sup>159</sup> This was, after all, the same era during which the efforts to define humanitarian limits within war were beginning to unfold.<sup>160</sup> Government justifications included "unprovoked aggression" by the enemy, provocation, self-defense, self-preservation, defense of vital interests, and necessity.<sup>161</sup>

Likewise at the international level, despite conceptual arguments that war was a readily available tool of national policy, in reality a full-scale war could have devastating consequences for the state deemed responsible. To avoid the embarrassment and disruption caused by full-scale war, states developed forms of coercion which did not constitute "war" under the law of nations, such as

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<sup>159</sup> *Id.* at 779.

<sup>160</sup> *See* Part II.A. *supra*.

<sup>161</sup> SHAW, *supra* note 155, at 779.



reprisals, pacific blockades, certain justifiable interventions, and naval demonstrations. These lesser forms of coercion were governed by their own legal doctrine which restricted their scope. For example, reprisals and justified interventions were bounded by the requirement of proportionality to the danger threatened and the restricted object of the use of force. Their limited purposes of punishment, prevention, or warning to the targeted nation did not include conquering or annexation.<sup>162</sup>

### **III.B.3. Legitimacy in the International Era**

At the dawn of the 20th century states could still argue that they had a sovereign right to engage in an aggressive war of conquest and annexation should they consider it within their interests. Nonetheless nations ravaged by the wars of the 19th century realized that the best hope of keeping Pandora's box closed would be eliminate war itself as a legitimate component of national policy. Two brutal world wars gave crucial impetus to movements not only to outlaw war by international treaty, but also to create a supranational structure to monitor and enforce the new regime.

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<sup>162</sup> *Id.*

The Covenant of the League of Nations arose out of the blood and ashes of World War I in an early effort to end all wars.<sup>163</sup> The League did not bar recourse to war,<sup>164</sup> however it did require disputes be submitted to arbitration, judicial settlement, or inquiry by the Council of the League prior to resort to war.<sup>165</sup> In no case were members to resort to war until three months after the arbitral award, judicial decision, or report by the Council, and no member was to go to war with a member complying with the award, decision, or report.<sup>166</sup>

The General Treaty for the Renunciation of War, also known as the Kellogg-Briand Pact of 1928, took the next giant step beyond the League of Nations to outlaw war as an instrument of national policy or means of dispute resolution.<sup>167</sup> Unfortunately neither the Kellogg-Briand Pact nor the League of Nations were able to prevent the onset of World War II.<sup>168</sup>

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<sup>163</sup> Treaty of Peace Between the British Empire et al. and Germany, June 28, 1919, 225 CONSOL. T.S. 188 (1919) [hereinafter *Covenant of the League of Nations*].

<sup>164</sup> *Id.* art. 10, 225 CONSOL. T.S. at 198.

<sup>165</sup> *Id.* arts. 12 & 15, 225 CONSOL. T.S. at 199-201.

<sup>166</sup> *Id.* arts. 12, 13 & 15, 225 CONSOL. T.S. at 199-201. Members that violated these rules faced potential collective action from League members. *See id.* art. 16, 225 Consol. T.S. at 201.

<sup>167</sup> General Treaty for the Renunciation of War, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter *Kellogg-Briand Pact*].

<sup>168</sup> The Kellogg-Briand Pact was somewhat toothless because it contained no provisions for enforcement of its proscription against war. *See BROWNIE, supra* note 154, at 90. However the pact was cited multiple times in response to perceived violations by other states during the period of 1929-1940. *See id.* at 74-80. The League of Nations was weak not only because the United States ultimately failed to join it, but because the Great Powers declined to enforce its limited provisions when put to the test by repeated aggressions leading up to WWII. *Cf. id.* at 55 (identifying faulty draftsmanship, political compromises, and the lack of

World War II produced two watershed developments in the battle to limit the resort to force: the international war crimes trials at Nuremberg and the founding of the United Nations. Both would help to set an outer boundary for permissible resort to force which did not include aggressive war.

The Charter of the International Military Tribunal authorized the prosecution of war criminals for "crimes against the peace", "war crimes," and "crimes against humanity."<sup>169</sup> The subsequent war crimes trials established the precedent that individuals can be held accountable for waging wars of aggression in violation of international treaties, agreements or assurances.<sup>170</sup> The Charter derived the general prohibition against aggressive war from such sources as the Kellogg-Briand Pact and other draft treaties which evinced an international intention to outlaw war.<sup>171</sup>

The United Nations was established in 1945 to prevent military conflict among its members and to settle international disputes.<sup>172</sup> The United Nations Charter first

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United States or U.S.S.R involvement as significant flaws in the League). Brownlie concludes from a study of the practice of states between the wars that while the Pact and the League may not have prevented WWII, they did help establish a customary rule that the "use of force as an instrument of national policy otherwise than under a necessity of self-defense was illegal." *Id.* at 110. This norm would figure prominently in the development of the United Nations structure.

<sup>169</sup> Charter of the International Military Tribunal, *supra* note 31, art. 6, 59 Stat. at 1547, 82 U.N.T.S. at 286-88.

<sup>170</sup> See *id.* art. 7, 59 Stat. at 1548, 82 U.N.T.S. at 288 (negating head of state immunity).

<sup>171</sup> See *The Nurnberg Trial*, 6 F.R.D. at 107-11.

<sup>172</sup> BARRY E. CARTER, ET AL., INTERNATIONAL LAW 977 (4th ed. 2003).

establishes a general prohibition against the use of force against other member states in Article 2(4), stating "[a]ll Members shall refrain in their internal relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."<sup>173</sup> However, the Charter permits the use of force for either collective security actions authorized by the Security Council or in self-defense. The Security Council can authorize collective military action to maintain or restore international peace and security.<sup>174</sup> As an ultimate backup to Security Council intervention, article 51 provides for individual or collective self defense against armed attack until the Security Council can take control of the situation.<sup>175</sup>

Under the United Nations regime, aggressive wars to acquire another state's property or territory are outlawed.<sup>176</sup> Article 2(1) emphasizes that the entire United

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<sup>173</sup> Charter of the United Nations, June 26, 1945, art. 2, 59 Stat. 1031, 1037 [hereinafter United Nations Charter]. The Charter entered force on October 24, 1945. As of May 2004 there were 191 parties to the Charter. Article 2(3) provides the peaceful counterpart to 2(4), requiring members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." *Id.* art. 2(3), 59 Stat. at 1037.

<sup>174</sup> *See id.* art. 42, 59 Stat. at 1043.

<sup>175</sup> *See id.* art. 51, 59 Stat. at 1044-45.

<sup>176</sup> Thomas Franck describes the Charter of the United Nations as a "dramatic return to just war theory and, since the end of the cold war, of just war practice." THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 313-314 (1995). In the future "one might reasonably expect to see UN peacekeeping and peace-enforcing contingents largely preempt the *right* justly to engage in war. All other war will be unjust." *Id.*

Nations framework is premised upon the principle of the sovereign equality of all its members.<sup>177</sup> Nor is the reach of the Security Council's collective action authority confined to member states. Article 2(6) states that the "Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."<sup>178</sup> Given the near-universal membership of the United Nations, the articles of the Charter dealing with the legitimacy of recourse to force arguably have the binding nature of customary international law versus non-members.

#### **IV. How the Limitations Upon Resort to Force Impact Property Acquisition in War**

##### **IV.A. Wars May No Longer Be Fought for the Purpose of Acquiring Property**

As outlined in the preceding section, with the establishment of the United Nations, wars may only be legitimately fought to accomplish one of two limited

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<sup>177</sup> United Nations Charter, *supra* note 173, art. 2(1), 59 Stat. at 1037.

<sup>178</sup> *Id.* art. 2(6), 59 Stat. at 1037.

objectives: either self-defense or collective action authorized by the Security Council. Not included in this short list are wars of conquest, annexation, or what has rather amorphously been termed "aggression." To the contrary, with the precedent of the League of Nations, the Kellogg-Briand Pact, the Nuremberg tribunals, and the purposes animating the creation of the United Nations, wars for these purposes have been overwhelmingly rejected as illegal.

This *jus ad bellum* restriction on legitimate causes for waging war directly controls *jus in bello* restrictions on property acquisition in war, because all property acquisition requires imperative military necessity, and what is necessary will be driven in part by the purpose of the war. For example, if one could legitimately launch a military offensive to seize oil or annex oil reserves, then a state could argue that exporting oil satisfied a military necessity, since it accomplished the objective of the conflict. But the age of wars to acquire territory and property with any semblance legitimacy ended with World War II.<sup>179</sup>

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<sup>179</sup> See BROWNIE, *supra* note 154, at 424 (concluding that the development in the legal regime up through the United Nations charter has established an "emphatic prohibition of the use of force for selfish reasons"). The war of conquest waged by Japan and Germany in World War II stands as the clearest example of aggressive war. *See id.* at 207-08.

This restriction exists at the initiation of the war, which is where *jus ad bellum* arguments are typically the most relevant.<sup>180</sup> But the restrictive influence of *jus ad bellum* considerations does not end there. The critical idea that national enrichment can no longer be an objective of war draws a line in the sand that belligerent states will not want to cross during the course of a war for fear of reaping the delictual or criminal consequences of waging a war of aggression.<sup>181</sup> This concern underlies the next section below.

#### **IV.B. Wars Initially Fought for Legitimate Purposes May Become Illegitimate Through Disproportionate or Illegal Property Acquisition**

This section will discuss how property acquisition that is either disproportionate to the military necessity arising from the objective of the action, or illegal under

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<sup>180</sup> Some have expressed the view that *jus ad bellum* solely governs the right to go to war. See Greenwood, *supra* note 42, at 221. Once the decision to use force is made, *jus ad bellum* concerns cease to be relevant, and *jus in bello* rules take over. Cf. Green, *supra* note 38, at 9 (observing that since the U.N. Charter only regulates *jus ad bellum*, once a conflict begins the guiding principles are from *jus in bello*). This paper follows the more modern approach that *jus ad bellum* concerns are relevant throughout the conflict, since actions taken within war can ultimately affect the legitimacy of the war itself. See Greenwood, *supra* note 42, at 222 ("While [*jus ad bellum*] will always operate before [*jus in bello*] comes into play, once hostilities have commenced it is necessary to consider both.").

<sup>181</sup> The Nuremberg tribunal viewed aggressive war as the "supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." *The Nurnberg Trial*, 6 F.R.D. at 86. Turned on its head, one could say that once individual war crimes accumulate to a certain point, they bring to life the ultimate war crime: aggressive war.

*jus in bello* rules, can convert an initially lawful resort to force into an illegal or aggressive war. This potential consequence forces a belligerent state to make property acquisition decisions taking into consideration more than just compliance with *jus in bello* rules. Thus *jus ad bellum* considerations present an overarching restraint on property acquisition in war.

On the international plane, states in the community of nations sit as the jury considering the legitimacy or lack thereof when other states resort to force. The United Nations Security Council<sup>182</sup> and General Assembly<sup>183</sup> provide two forums at the global level for considering state justifications for use of force, as well as subsequent actions in pursuit of those justifications. United Nations organs and member states focus on two key questions in evaluating legitimacy: "was the resort to force justified?"<sup>184</sup> and "was the resort to force proportional to the rationale that necessitated the action?"<sup>185</sup> An affirmative response to both questions places an international stamp of legitimacy upon a state's action.

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<sup>182</sup> See United Nations Charter, *supra* note 173, arts. 24, 34 & 39, 59 Stat. at 1041-43.

<sup>183</sup> See *id.*, arts. 10-14, 59 Stat. at 1038-39.

<sup>184</sup> Justification addresses whether the resort to force is sanctioned under the United Nations system, discussed in Part III.B.3 *supra*. This question evaluates the legitimacy of war at its initiation—the classic domain of *jus ad bellum*.

<sup>185</sup> Unfortunately an objective response to both questions would be difficult to achieve in reality except in the case of gross breaches of international law given the political considerations that drive the relations between states.



The belligerent receiving this approval, whether fighting in self-defense or as part of a coalition pursuing Security Council directives, would be engaged in the modern equivalent of a just war.<sup>186</sup>

Necessity and proportionality are guiding principles for military actions taken within war. Just as within war these concepts are designed to limit the consequences of war to the minimum necessary, so at the top of the scale these concepts serve to constrain the recourse to war itself. The logic and symmetry of these precepts are striking. If a state must resort to force, it had better be because of a compelling necessity, which in the United Nations era will ordinarily require a threat justifying action in self-defense. One's resort to force should not be disproportionate to the cause that animated it.<sup>187</sup> And once the armed conflict is under way, the dual principles of military necessity and proportionality continue to guide the military in accomplishing their objectives.<sup>188</sup>

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<sup>186</sup> See BROWNIE, *supra* note 154, at 214 (stating that even when a state acts in self-defense or pursues a lawful object of policy, the burden of proving the legality of the resort to force rests on the state asserting the necessity of self-defense).

<sup>187</sup> Cf. FM 27-10, *supra* note 2, ¶ 434 ("Action in self-defense must be confined to measures reasonably necessary for repelling the danger; the principle of proportionality is innate in any genuine concept of self-defense."); SHAW, *supra* note 155, at 790 (stating that legitimacy of an action in self defense depends on the character of the threat and the nature of the response, for the response must be proportionate); Greenwood, *supra* note 42, at 223 (stating that once a state's response ceases to be reasonably proportionate then it is itself guilty of a violation of the *jus ad bellum*).

<sup>188</sup> See Green, *supra* note 38, at 152, 330-332 (discussing how the rule of proportionality within warfare weighs the expected military advantage to be gained against the incidental loss of civilian life and property, and prohibits attacks where the balance is considered skewed against the latter).

This conclusion forms a corollary to the conclusion that legitimate wars must be fought for legitimate objectives. Or as the arbitral tribunal stated in the *Naulilaa* case, "the employment of force is only justifiable by a necessity to use it."<sup>189</sup> Under the United Nations system, legitimate objectives are limited to self defense and collective security actions to remedy a breach of the peace.<sup>190</sup> The limitation upon the scope of war necessarily creates limitations upon the actions taken within war. For example, if an attacked state counter-attacked to drive off an aggressor, its actions could be justified under the Article 51 right of self-defense. But if that same state moved to plunder or devastate the aggressor beyond what military necessity dictated to repel the attack, its actions could move beyond the scope of Article 51 and constitute an independent breach of the peace and international law.<sup>191</sup>

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<sup>189</sup> MARJORIE M. WHITEMAN, 12 DIGEST OF INTERNATIONAL LAW 148-149 (1963) (citing 2 REPORTS OF ARBITRAL AWARDS 1013 (1928)). The *Nautilaa* arbitral decision rejected a claim by Germany that its military invasion of Portuguese South-West Africa was a legitimate reprisal because it lacked proportionality to the alleged offense that provoked it. *Id.* Reprisals are analogous to the remaining legitimate justifications for using force, since actions in self-defense or pursuant to Security Council direction come in response to an initial breach of international law by another state. Therefore the holding that the "employment of force is only justifiable by a necessity to use it" and "must be reasonably proportionate to the injury suffered" translates directly to the use of force in self-defense or to restore a breach of the peace with Security Council authorization. *See id.*

<sup>190</sup> Cf. BROWNLEE, *supra* note 154, at 331 (arguing that while there is a right to collective self-defense of a third state, aid given should be for that purpose only and consonant with the requirement of proportionality).

<sup>191</sup> Compare Secretary of State Webster's view of the permissible scope of self defense in the context of the *Caroline* incident of 1837. He stated that once the necessity for self-defense had been shown, the acting

Likewise Security Council collective action is limited by the Charter to maintaining or restoring international peace and security.<sup>192</sup> Member states accepting Security Council tasking to restore peace and security are given specific objectives to accomplish. Should they wage war for national interests beyond that tasking, such as for national enrichment, that too could be viewed by the international community as *ultra vires* and illegitimate.<sup>193</sup>

The impact and interaction of *jus ad bellum* and *jus in bello* rules regarding property acquisition and resort to force can be illustrated by identifying potential consequences for a belligerent nation at the conclusion of a conflict. A nation deemed to have engaged in an "aggressive" war (not in self-defense or pursuant to

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party would also be required to show that they did "nothing unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it." LOUIS HENKIN, INTERNATIONAL LAW 663-664 (1987) (citing the letter from Secretary Webster to the British Ambassador in Washington of April 24, 1981, in 29 BRITISH & FOREIGN STATE PAPERS 1129, 1138 (1937)). Green takes a more aggressive approach, observing that under article 51 of the United Nations Charter, once an action in self-defense is launched there is no obligation upon that party to limit his activities to those essential to his self-defense. See Green, *supra* note 38, at 9. If a belligerent's territory has been invaded, he does not have to stop once the invader is expelled, but may continue to wage war until he is satisfied that the aggressor is defeated and no longer poses a threat. *Id.*

<sup>192</sup> See United Nations Charter, *supra* note 173, art. 24, 59 Stat. at 1041. The Security Council is constrained by the provisions of the Charter itself, including the rules and procedures in chapters V through VII. See SHAW, *supra* note 155, at 876-77.

<sup>193</sup> The Security Council has the power to launch a war of sanction, which seeks to extirpate the source of aggression and impose measures intended to prevent further breaches of the peace by the aggressor state. See BROWNIE, *supra* note 154, at 332. Brownlie states that in such wars there is "no application of the principle of proportionality." *Id.* This opinion might be premised upon a belief that regime change is the ultimate penalty; therefore, no scaled back "proportional" response is required to accomplish a more limited objective. The actions of states carrying out the war of sanction will still be bound by proportionality and necessity, especially in the arena of property acquisition.

However some scholars have identified a gap in the law of war in that there is no regulation of the application of the laws of armed conflict to hostilities in which U.N. forces are engaged. See DOCUMENTS, *supra* note 14, at x. Presumably states will act in accordance with obligations arising from conventions they have signed, customary international law, and by informal agreement on specific issues.

Security Council direction) will be liable for restitution of property taken and reparations for damage inflicted in the course of the conflict.<sup>194</sup> In addition, those in positions of power within the aggressor nation may face criminal liability before a tribunal or international court for crimes against the peace under the Nuremberg precedent. The criminal prosecution may include charges of war crimes as well if, while prosecuting this aggressive war, the nation engaged in plunder and pillage--in other words acquired property for purposes unconnected with military necessity and in violation of the laws of war.<sup>195</sup> This was precisely the situation Germany found itself in at the conclusion of World War II.<sup>196</sup>

On the other hand, a nation engaged in a proportional and necessary action in self-defense or pursuant to Security Council direction will not incur liability for reparations, restitution, or criminal liability provided

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<sup>194</sup> See BROWNLIE, *supra* note 154, at 147-49 (observing that once the illegality of an aggressive war is acknowledged, the obligation to make reparation for loss arises by operation of international law as a state delict). The threat is hypothetical, since in reality what consequences any given nation may face for its conduct will depend upon its power and position within the world community, whether or not it won the conflict, and global political resolve to do something about a particular situation.

<sup>195</sup> There appears to be solid consensus for the rule that *jus in bello* applies to all belligerents equally, regardless of whether one of the belligerents is considered to be at fault from a *jus ad bellum* perspective for pursuing an unjustified war. See MARCO SASSOLI & ANTOINE A. BOUVIER, *HOW DOES THE LAW PROTECT IN WAR?* 84 (1999); Greenwood, *supra* note 42, at 225-27; Green, *supra* note 38, at 327; cf. Smith, *supra* note 44, at 231 (stating that Germans had the right of occupying forces under the Hague Regulations in territories they had conquered).

<sup>196</sup> Consequences for violations are one area where *jus ad bellum* and *jus in bello* rules target different audiences. Violations of *jus ad bellum* will typically be prosecuted against a limited range of high-ranking officials in a position to make policy-level decisions. By contrast, *jus in bello* rules are addressed to the entire chain of command. See Greenwood, *supra* note 42, at 232.

their actions within the war do not exceed the legitimate objectives which justified the war or the laws of armed conflict regarding property acquisition.<sup>197</sup> The more excessive the belligerent's property acquisition is perceived to be however, the higher the likelihood that state may begin to incur liability.<sup>198</sup> If it appears that the state engaged in a campaign of plunder, even in response to the initial provocation of another state's attack, that state's claim of self-defense may be perceived as merely a pretext for aggression and war crimes.

A similar concern helps explain the decision of the coalition in the First Gulf War to end the armed conflict after pushing Iraq out of Kuwait, vice pressing on to overthrow Saddam Hussein in Baghdad. Countries involved in the collective security action were concerned about exceeding the limits of Security Council authorization.<sup>199</sup>

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<sup>197</sup> Cf. *id* at 223 (observing that when a state acting in self defense launches a legitimate attack under *jus in bello* rules against a legitimate military target using methods that are not forbidden by *jus in bello*, it will still violate international law if unjustified by reference to the principle of self defense). This paper contends that the same principle applies to property acquisition actions.

<sup>198</sup> International law contains no rigid rules about what amounts to reasonable measures—each case will turn on the facts and circumstances of the case. See *id*. Greenwood suggests that at the extreme end of the scale of conflict, such as the Second World War, *jus ad bellum* concerns will have little influence. *Id*. This opinion may help explain the aggressive property acquisition approach taken by the Allies in World War II, which effectively amounted to seizing everything and leaving the details to the end of the conflict. See discussion note 98, *supra*.

<sup>199</sup> The Security Council's authorization for the use of force in Resolution 678 only authorized member states to implement prior Security Council Resolution 660, which in turn had demanded that Iraq return to its pre-invasion border with Kuwait. See S.C. Res. 660, U.N. SCOR, 2932d mtg. at 19, U.N. Doc. S/RES/660 (1990); S.C. Res. 678, U.N. SCOR, 2963d mtg. at 27, U.N. Doc. S/Res/678 (1990). During the timeframe of the First Gulf War, there appeared to be a general consensus that the coalition was not authorized to occupy Iraq and oust its military regime. See Sean D. Murphy, *Assessing the Legality of*

Likewise if Kuwait had moved to annex Iraq's southern oil fields under the guise of self-defense after Iraq's invasion, the Security Council would have faced a situation where the victim became the aggressor, and excessive property acquisition vitiated what had initially been a legitimate exercise in self defense.

#### **IV.C. Application of *Jus in Bello* and *Jus ad Bellum* Restrictions Upon an Armed Force Acquiring Property in War**

##### **IV.C.1. Introduction**

The final section of this paper will join a hypothetical armed force as it marches into enemy territory encountering enemy property ripe for capture as the spoils of war. The six potential caches of booty encountered—boots, bombs, bullion, barrels (of oil), bukharas (carpets), and bells—will help illustrate the overarching impact of *jus ad bellum* considerations upon property acquisition in war.

##### **IV.C.2. Boots to Booty: Militarily Usable Property**

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*Invading Iraq*, 92 GEO. L.J. (forthcoming 2004); FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING 668 (2d ed. 1993).

An invading army discovers a warehouse stocked with combat boots. Can the boots be made booty? Analysis begins within the framework of *jus in bello*. Is the character of the property susceptible to military use? With combat boots, the answer presumably is yes. Does the army have a need to either use the property or deny its use to the enemy? If yes, then the army can destroy or capture the footwear.<sup>200</sup>

Assuming the boots were seized, what disposition can be made of the property? Under the laws of *jus in bello*, if the capture was permissible and title transfers, the capturing army can dispose of them as they please.<sup>201</sup> But this is not the end of the analysis; instead, the background influence of *jus ad bellum* becomes relevant. Dispositions inconsistent with military necessity may raise questions regarding the underlying legitimacy of the war. The international community will be interested in the disposition of individual seizures to the extent they reveal cumulative patterns of property disposition. Cumulative patterns will answer whether the seizures were

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<sup>200</sup> Who owns the boots will determine whether a claim for compensation arises upon seizure. See discussion Part II.B.1 (public property) and II.B.2 (private property) *supra*.

<sup>201</sup> As discussed in Part II, the only reason title would not transfer would be if either the army chose to control the property vice take possession, or if the property itself was of a non-militarily-usable character, such as cultural property.

genuinely motivated by military necessity, or rather a pretext for plunder. If it begins to appear that a campaign of plunder is underway, the legitimacy of the original *casus belli* may be called into question. For example, a claim that a nation is acting in self-defense will ring less true if it appears self-defense was merely the key to the vault that is now being emptied. The burden of proof rests upon the acquiring army to defend the legitimacy of actions taken.

If in our hypothetical the boots are loaded on trucks, packed on out-bound ships, and returned to the attacker's homeland, there may be questions raised. Was it necessary to take the property out of country to deny it to the enemy? What became of the boots? Were they sold to surplus stores? Were they used to equip the attacker's feet? If the boots are exported out of country, the military justification will be harder to defend. The scope and scale of property removal will provide visible evidence. Perhaps one warehouse worth of boots does not evince any intent to enrich one's nation by the plunder of another. But boatload after boatload of everything state-owned and not nailed down will begin to tip the balance of *jus ad bellum*, eventually calling into question the legitimacy of the war. If it appears the property could



have been sequestered and secured in-country with little or no loss of military efficiency, the negative perception will be exacerbated.<sup>202</sup> If in retrospect a war of self-defense has morphed into a war of aggression and plunder, liability for reparations may very well attach, along with potential sanctions for illegitimate war.

#### **IV.C.3. Bombs to Booty: The Weaponry of War**

Destroying and securing enemy weaponry is the sine qua non of military warfare, so military necessity is for all practical purposes presumed. Unlike generic supplies, such as boots, there would appear to be little quibble with an attacking or occupying power taking complete possession of enemy military hardware. Article 53 of the Hague Regulations specifically permits the seizure of "arms depots," although as usual all seizures should be read in conjunction with the military necessity requirement of

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<sup>202</sup> It might seem contradictory that a nation with good title to seized property could still be constrained in disposing of it. There is a natural expectation that the conclusion of the war will be the logical point to decide questions of restitution and reparation. Extracting reparations as the war progresses, while perhaps consistent with the concept of war paying for itself, can create the wrong international impression if taken to excess. If instead property is sequestered for disposition at the making of the peace, the motives of the seizing nation will be less likely to come into question. The Allies seized vast quantities of property as they recaptured Europe in World War II. But frequently they put the property to immediate use to benefit the civilian populace of the liberated country. See Smith, *supra* note 44, at 236-38 (stressing the importance of putting to the best and quickest use everything that was in fact useful). Property useful for relief of the civil population was considered "war material" and its distribution a "military activity." *Id.* at 238. Such disposition would be hard to criticize given the spirit of the Hague Regulations and Geneva Conventions on protecting and preserving the property of an occupied nation for the benefit of its civilian population.

article 23(g).<sup>203</sup> Thus, the overarching influence of *jus ad bellum* will be considerably reduced for decisions to seize the weapons of war.

Of course *jus ad bellum* may still drive disposition of acquired weaponry at the conclusion of a conflict. An aggressor nation that acquired military armaments from victimized nations could be forced to return or destroy them as part of reparations, even though their acquisition did not violate any *jus in bello* rules.<sup>204</sup> Likewise the country engaged in a legitimate self-defense action would risk little international censure if it opted to remove and retain seized weaponry.<sup>205</sup>

These conclusions are unlikely to change if the action undertaken is pursuant to a U.N. Security Council authorization. The aggressor nation who breached the international peace may suffer the loss of sovereign rights to possess certain military weaponry as a sanction. One recent illustration is the U.N. Security Council ceasefire resolution following the First Gulf War in 1991.<sup>206</sup> Iraq was forced to accept stringent restrictions on forms of

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<sup>203</sup> Hague Convention of 1907, *supra* note 26, annexed regulations arts. 23(g) & 53, 36 Stat. at 2302, 2308. To the extent the arms are privately owned (for example if our "depot" was actually a retail firearms store) issues of compensation and restoration will also be implicated.

<sup>204</sup> The peace treaty could provide for demilitarization to ensure no repetition of their breach of the peace. The aggressor nation's own military forces may also be subjected to removal or destruction.

<sup>205</sup> The aggrieved nation could stockpile seized weapons to deny their use in a future attack and to enhance their own defensive military capabilities.

<sup>206</sup> S.C. Res. 687, U.N. SCOR, 2981st mtg. at 11, U.N. Doc. S/RES/687 (1991).

weaponry considered offensive in nature (e.g. long-range missiles) and to destroy, with international monitoring, stockpiles and the capacity to develop such weapons.<sup>207</sup>

#### **IV.C.4. Bullion to Booty: Cash, Gold, and Realizable Securities**

Armed forces concerned with denying the use of monetary resources and their equivalent to the enemy will make securing financial institutions a top priority. An invading nation may seek to prevent the current leadership from emptying the vaults of gold, cash, or negotiable securities to pad their life in exile or fund an insurgency against occupation forces. In addition to these legitimate aims, some countries may harbor avaricious motives—quite simply the desire to loot the treasure and use it to enrich the attacking nation.<sup>208</sup> Thus to a far greater extent than a warehouse full of boots, extremely valuable state property like gold, cash, and negotiable securities are a tantalizing prize whose seizure can quickly call into question the legitimacy of the resort to force.

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<sup>207</sup> *Id.* ¶¶ 8-13, at 13.

<sup>208</sup> See, e.g. ARTHUR L. SMITH, JR., *HITLER'S GOLD* (1989) (describing the German removal of gold from occupied territories and the Allied forces' efforts to recover it).

From the perspective of *jus in bello* restrictions, the Hague Regulations permit the seizure of state-owned property, including cash, funds, and realizable securities.<sup>209</sup> This acquisition is constrained by a requirement of military necessity, however there is little doubt that in addition to an interest in denying the property to the enemy, the belligerent can also put this property to use acquiring logistical supplies.

But while *jus in bello* rules might give the army of occupation a green light to acquire, *jus ad bellum* legitimacy concerns constrain the acquisition of such lucrative property. The world still recalls the brazen plunder of Europe by Germany in World War II, where acquisition of wealth formed a central rationale for the war.<sup>210</sup> Despite the fact that gold comprises a legitimate type of booty, the allies deemed all gold "wrongfully" removed from the possession of occupied central banks to be "loot."<sup>211</sup>

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<sup>209</sup> See Hague Convention of 1907, *supra* note 26, annexed regulations art. 53, 36 Stat. at 2308. Seizing the assets of private banks raises a twist. Either the occupying power is making a forced loan or sequestering the property to prevent its misuse. Article 53 appears to preclude seizures from private parties when it states that the army of occupation can "*only* take possession of cash, funds, and realizable securities which are *strictly* the property of the State" (emphasis added). *Id.*

<sup>210</sup> The Nazis are reported to have seized approximately 625 million dollars worth of monetary gold from the central banks of occupied nations. See SMITH, *supra* note 208, at xii (calculated at the pre-1939 value of 35 dollars per ounce). The Allies recovered approximately 330 million dollars worth of gold and assumed the rest passed into the vaults of neutral Europe, especially Switzerland. *Id.*

<sup>211</sup> See *id.* at xi; discussion note 218 *infra*.

There could be a couple of explanations for how a seizure apparently justified under article 53 of the Hague Conventions and the law of nations could be considered "plunder." First, the war itself was considered a war of aggression, therefore all of Germany's actions in disturbing the status quo by invasion were considered "wrongful," especially by the dispossessed Governments. This view must be squared with the principle that the laws of war apply to both sides equally, even if one side is considered the aggressor.<sup>212</sup> The answer may be that the theft of gold rose to such a level of severity as to be considered bound up with an illegal objective of war—a *jus ad bellum* foul. This would permit the emptying of bank vaults to be used as evidence aggravating the crime of waging aggressive war, as opposed to using it to prosecute individuals for the war crime of pillage.<sup>213</sup>

Alternatively, there may be an unstated trend toward viewing monetary gold as a capital resource of the occupied state. As such, the relevant provisions of humanitarian law may be closer to the rules of usufruct in article 55 of the Hague Regulations.<sup>214</sup> Carting off the corpus wholesale

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<sup>212</sup> See discussion note 212 *supra*.

<sup>213</sup> The Nuremberg judgment focused on Germany's military attacks on her neighbors as the acts constituting the offense of waging aggressive war. See *The Nurnberg Trial*, 6 F.R.D. at 107-111. In other words, classic *jus ad bellum* violations were committed once the attacks were launched.

<sup>214</sup> See Hague Convention of 1907, *supra* note 26, art. 55, 36 Stat. at 2309.

back to one's home country and subsequently disposing of the booty could be considered a war crime at the *jus in bello* level under this approach. The Nuremberg Tribunal accused the German defendants of systematically pillaging private and public property, a war crime, in violation of obligations under the Hague Regulations not to make the economy of an occupied country cover the expenses of the occupation beyond what it can "reasonably be expected to bear."<sup>215</sup> Since the court lumped all German acquisitions together in their sweeping overview, the relation of monetary assets to this judgment is difficult to ascertain.

There is no doubt however that a nation may not enrich itself at the expense of its neighbor, regardless of the initial justification for going to war. National enrichment as a justification for war was discredited at Nuremberg and extinguished with the birth of the UN system and its restricted justifications for the use of force.

So to the extent occupying powers still have discretion to make use of state-owned monetary assets to support the military effort and subsequent occupation, they are well-advised to treat gold under the usufruct

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<sup>215</sup> See *The Nurnberg Trial*, 6 F.R.D. at 120-23 (citing Hague Regulations articles 49 (contributions), 52 (requisitions), 48 (taxes), 53 (seizure), 55 (usufruct), and 56 (cultural property), in drawing the conclusion that the economy of an occupied country cannot bear expenses beyond what is "reasonable").

construct.<sup>216</sup> Because of its high value, gold and cash may need to be moved out of an occupied country if it cannot be adequately secured.<sup>217</sup> Strict accounting and meticulous records will be essential not only to keep the occupying nation's personnel honest, but also to provide reliable books for the world community to inspect as required.<sup>218</sup>

*Jus ad bellum* concerns have also profoundly impacted the behavior of coalition forces occupying Iraq after the Second Gulf War in 2003. The 2003 invasion of Iraq was justified by the United States and its allies as an action in collective security authorized by prior U.N. resolutions.<sup>219</sup> Security Council authorization also under

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<sup>216</sup> See discussion, Part II.B.1. *supra*. Occupying powers will have a responsibility to ensure a workable financial system exists within occupied territory. This concern may act as a counterbalance to the urge to export currency and its equivalent. Cf. Hague Convention of 1907, *supra* note 26, annexed regulations arts. 48-51, 36 Stat. at 2307 (discussing contributions from an occupied territory).

Jeannette Greenfield also suggests that there is "some precedent for the application of gold booty as reparations." See Jeannette Greenfield, *The Spoils of War*, in *THE SPOILS OF WAR* 34, 38 (Elizabeth Simpson ed., 1997) (distinguishing gold as a currency from other types of spoils). To the extent that statement is supported by state practice, it still supports strict accounting, since reparations are generally calculated at the conclusion of a conflict. See SMITH, *supra* note 208, at 100 (describing the intention of the Allies to use the captured gold for reparations and restitution).

<sup>217</sup> Rumors abounded after World War II about gold slipping through the Allies' fingers into the pockets of Allied troops or retreating Germans, who subsequently lived happily ever after. See SMITH, *supra* note 208, at 96.

<sup>218</sup> After U.S. troops in World War II stumbled upon hidden German caches filled with gold, Eisenhower's staff drafted a legal opinion pointing out that under international law the movable property of the enemy state becomes the property of the capturing power. See *id.* at 93. This affirms the basic position that monetary gold as lawful booty. Needless to say the original governmental owners of the looted gold were keen on ensuring they received maximum restitution, which did in fact take place over the next forty years. See *id.* at 114-161; Agreement on Reparation from Germany, Jan. 14, 1946, Part. III, 61 Stat. 3157, 3180 (pooling monetary gold captured in Germany for distributions based on percentages to those countries who had lost gold through German looting).

<sup>219</sup> See, e.g., Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (2003) (stating that the U.N. authorization for using force against Iraq contained in Security Council Resolution 678, *supra* note 199, had been reawakened after Iraq breached the terms of the ceasefire

girds the post-war occupation, which received international sanction with U.N. Security Council Resolution 1483 (2003).<sup>220</sup> Resolution 1483 directs the occupying powers to comply with international law obligations, including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.<sup>221</sup> To ensure transparency and prove that funds and financial assets belonging to the previous Government of Iraq are used for the benefit of the people of Iraq, the resolution approved the establishment of a Development Fund for Iraq (DFI).<sup>222</sup> This fund is to be used to for humanitarian needs, economic reconstruction, disarmament, the costs of Iraqi civilian administration, and other purposes benefiting the Iraqis.<sup>223</sup>

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Security Council Resolution 687, *supra* note 206, as affirmed by Security Council Resolution 1441, U.N. SCOR, 4644th mtg. S/RES/1441 (2002)).

Murphy argues that the authorization allegedly possessed by the United States and its coalition to go to war against Iraq does not withstand scrutiny when analyzed against the language of relevant Security Council resolutions and the context of their adoption. *See* Murphy, *supra* note 199. If correct, the invasion itself would arguably constitute an act of aggression under international law. The normal United Nations reaction to an act of aggression would include condemnation and decisions seeking reversal of the invasion, as well as assessing accountability for consequences flowing from the breach of the peace. *Cf.* S.C. Res. 674, U.N. SCOR, 2951st mtg. ¶ 8, at 25, 26, U.N. Doc. S/RES/674 (1990); S.C. Res. 686, U.N. SCOR, 2978th mtg. ¶ 2, at 8, 8-9, U.N. Doc. S/RES/686 (1991); and S.C. Res. 687, *supra* note 206, ¶ 16, at 14 (all holding Iraq liable under international law for any direct loss, damage, depletion of natural resources, or injury to foreign governments, nationals, and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait). However, to the extent the international community shares Murphy's opinion, it has been unwilling or unable to take such actions. To the contrary, by virtue of Security Council Resolution 1483 (2003), the UN has acceded to, or even ratified the action *post hoc*. *See* S.C. Res. 1483, U.N. SCOR, 4761st mtg., U.N. Doc. S/RES/1483 (2003); *see also* S.C. Res. 1511, U.N. SCOR, 4844th mtg., U.N. Doc. S/Res/1511 (2003). Therefore at a minimum the post-war occupation of Iraq has the *ex post facto* imprimatur of the U.N. Security Council as a legitimate exercise of collective action.

<sup>220</sup> *See* S.C. Res. 1483, *supra* note 219.

<sup>221</sup> *Id.* ¶ 5, at 2.

<sup>222</sup> *Id.* ¶¶ 12-14, at 4. The DFI is audited by independent public accountants along with representatives from the United Nations, the Arab Fund for Social and Economic Development, the International Monetary Fund, and the World Bank. *Id.* ¶ 12, at 4.

<sup>223</sup> *Id.* ¶ 14, at 4.



The Coalition Provisional Authority (CPA), administering post-war Iraq "consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war," has disseminated regulations and other guidance on the DFI.<sup>224</sup> Iraqi state assets and former regime-owned assets wherever found are to be turned over to coalition authorities for transfer into the DFI for the benefit of Iraq.<sup>225</sup> The CPA also promotes transparency by publicly reporting funds coming into and out of the DFI.<sup>226</sup>

These rules and procedures were not just created for hypothetical situations. In 2003, coalition forces reportedly had access to 1.7 billion dollars in frozen Iraqi assets in the United States, hundreds of millions

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<sup>224</sup> See, e.g., Coalition Provisional Authority Regulation Number 2: Development Fund for Iraq, (signed Jun. 15, 2003), at <http://www.cpa-iraq.org/regulations/REG2.pdf>; Coalition Provisional Authority Regulation Number 3: Program Review Board, (signed Jun. 15, 2003) (establishing a program review board to oversee the expenditure of DFI funds to ensure that all state- and regime-owned cash, funds, or realizable securities seized by coalition forces in Iraq are only used for the benefit of the people of Iraq), at <http://www.cpa-iraq.org/regulations/REG3.pdf>.

<sup>225</sup> See, e.g., Coalition Provisional Authority Memorandum Number 10: Rewards Program for Information Leading to the Recovery of Iraqi State and Former Regime Assets, (signed Apr. 4, 2004) (providing a reward for information leading to recovery of Iraqi state assets and former regime-owned assets for deposit into the DFI or other account established to receive such assets), at [http://www.cpa-iraq.org/regulations/20040406\\_CPAMEMO10.pdf](http://www.cpa-iraq.org/regulations/20040406_CPAMEMO10.pdf); Coalition Provisional Authority Order No. 4: Management of Property and Assets of the Iraqi Baath Party, (signed May 25, 2003) (declaring that all property and assets of the Iraqi Baath Party are subject to seizure by the CPA for the benefit of the people of Iraq), at <http://www.cpa-iraq.org/regulations/CPAORD4.pdf> [hereinafter CPA Order No. 4]; Guidance on the Use of the Development Fund for Iraq (DFI) In Support of the Commander's Emergency Response Program (CERP) (identifying uses for DFI funds), at <http://www.cpa-iraq.org/budget/CERP-main.html>. See also S.C. Res. 1483, *supra* note 219, ¶ 23, at 7 (directing that member states with financial assets of the previous government of Iraq or senior Iraqi officials freeze those assets and transfer them to the DFI).

<sup>226</sup> See, e.g., Coalition Provisional Authority background paper and charts on the DFI, at [http://www.cpa-iraq.org/budget/DFI\\_introl.html](http://www.cpa-iraq.org/budget/DFI_introl.html) (last modified Apr. 24, 2004); Republic of Iraq Budget Revenues and Expenses July-December 2003, at <http://www.cpa-iraq.org/budget/2003budget.pdf>; Republic of Iraq Budget 2004, at <http://www.cpa-iraq.org/budget/NIDmergedfinal-11Oct.pdf>.

dollars frozen abroad, 700 million dollars in cash found in Iraq, and approximately 13 billion dollars in oil-for-food escrow accounts.<sup>227</sup>

In conclusion, the United States-led coalition sought to establish transparent procedures to prove to the world that the cash, funds, and realizable securities seized in Iraq or banks around the world were being used to benefit the Iraqi populace. The DFI arrangement provides compelling support for the view that monetary assets should be dealt with under the usufruct concept, not simply seized for miscellaneous war expenses. This effort fortified the legitimacy of the war and occupation from a *jus ad bellum* perspective by rebutting arguments that both were simply an opportunity for certain states to profit at Iraq's expense.<sup>228</sup>

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<sup>227</sup> See *United States Policy Toward Iraq: Hearing Before the House Comm. on International Relations*, 108th Cong. 16-17 (2003) (statement of Douglas J. Feith, Undersecretary of Defense for Policy).

<sup>228</sup> In fact, observers may conclude that far from creating a financial net gain for the United States and its allies, the occupation of Iraq could be a net loss. The U.S. Congress has appropriated billions to fund the occupation and reconstruction of Iraq, while the U.S. Department of State has made the diplomatic rounds seeking billions more from deep-pocketed allies. See, e.g., *Q&A Iraq One Year Later; U.S. Role is Far From the End*, ST. PETERSBURG TIMES, Mar. 27, 2004, at 4A (Placing the Pentagon's cost figure for the Iraq war and occupation for calendar year 2003 at 56 billion dollars and funds appropriated by Congress for reconstruction in 2003 and 2004 at approximately 21 billion dollars); Tim Harper, *US Weighs the Return of Military Conscription*, TORONTO STAR, Apr. 22, 2004, at A10 (quoting the Chairman of United States Joint Chiefs of Staff General Richard Myers as saying the war in Iraq is costing the United States 4.7 billion dollars per month and also reporting that some in the United States Congress believe the President will soon be requesting an additional 50-75 billion dollars for costs associated with Iraq in 2004); Francis Elliot, *Iraq War Chest will be Empty by July*, INDEPENDENT ON SUNDAY, Mar. 21, 2004 (reporting that a war chest of 3.8 billion pounds devoted toward operations in Iraq will be empty within three months and relaying an estimate from the British Defense economists that the war is costing the British taxpayer up to 125 million pounds per month). Of course some U.S. taxpayer money returns to U.S. pockets through contracts awarded to U.S. firms.

#### IV.C.5. Barrels to Booty: Oil and Other Natural Resources

When industrialization teamed up with petroleum to power an economic revolution in the twentieth century, an addiction to reliable and affordable oil supplies developed in industrialized nations. "Black gold" is a classic dual-use product valued for both military and civilian applications. Since petrochemicals are vital to military operations, they make prime targets for destruction, denial, or acquisition in warfare.<sup>229</sup> Their acquisition is therefore sanctioned under *jus in bello* rules by Hague Regulation article 53, which allows the seizure of all types of state-owned property, including "stores and supplies." Military necessity is required, but easily found.

Oil could potentially fall into two categories within a country under attack: in storage or in underground reservoirs. Seizure of the stored oil will receive *jus in bello* sanction, but export from an occupied country for sale to a third country, the seizing country, or addition to the attacker's strategic reserves may implicate *jus ad bellum* concerns. This is the classic question of motives.

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<sup>229</sup> But oil is no longer a legitimate reason to go to war. Cf. ROBERT GORALSKI & RUSSELL W. FREEBURG, OIL & WAR 141 (1987) ("The calculations and hopes of the war planners were fixed . . . on the rich oil fields of the Netherlands East Indies, the prize for which Japan went to war" (citing a U.S. Strategic Bombing Survey from World War II)).

The seizing country will need to take fiduciary care in tracking the disposition of the oil and its profits, with every dollar tied to supporting the military effort in-country or set aside for resolution at war's end.

Oil could also be pooled underground waiting to be pumped out. In this form, an attacking force will initially want to ensure the enemy cannot access the oil by seizing or destroying production facilities. An occupying force on the other hand will want to put this resource to work. The Hague Regulations require an occupying power to safeguard and administer natural resources in accordance with the rules of usufruct.<sup>230</sup> In other words, the occupying power is administering the resource on behalf of the occupied nation, not solely for the benefit of the occupying power. The eyes of the international community will be interested in the allocation made between occupation expenses and support to the civilian population, since excessive diversion to the occupying power may start to smack of plunder.<sup>231</sup>

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<sup>230</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 55, 36 Stat. at 2309. Article 55 refers to "public buildings, real estate, forests, and agricultural estates." *Id.* However there is no reason why this construct should not be extended to mineral resources such as oil, although technically since oil is not a renewable resource, the regime should be called quasi-usufruct. See BLACK'S LAW DICTIONARY, *supra* note 48, at 1542 (defining "quasi-usufruct" as a "right to consume things that would otherwise be useless, such as money or food. Unlike a perfect usufruct a quasi-usufruct actually involves alteration and diminution of the property used").

<sup>231</sup> See *The Nurnberg Trial*, 6 F.R.D. at 122 (providing a German directive stating the objective of the campaign against the Soviet Union was "to obtain the greatest possible quantity of food and crude oil for

The post-war occupation of Iraq beginning in 2003 illustrates the importance of proving conduct in accordance with *jus ad bellum*. The Coalition Provisional Authority (CPA) and the United Nations have taken great pains to emphasize that oil pumped out of Iraq is being used solely for the benefit of Iraqis.<sup>232</sup> The Development Fund for Iraq (DFI), discussed in the previous section, is also the designated repository for oil revenues.<sup>233</sup> The United States and the United Nations seek to defuse allegations that the invasion and occupation of Iraq were designed to gain access to one of the world's largest oil reserves. Oil is sold on the open world market, not shipped gratis to U.S. ports. The fact that the United States and the United Nations go to these lengths to prove the bona fide of their intentions validates the over-arching influence of *jus ad bellum* upon property acquisition in war and provides more support towards placing a near fiduciary duty upon occupying powers in dealing with public property.

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Germany" as evidence of Germany's campaign of pillage and plunder "with complete disregard for the needs of the inhabitants of the occupied territory").

<sup>232</sup> The arguments states make in defending their actions are themselves recognition of the continuing validity of *jus ad bellum* during a conflict. Cf. Greenwood, *supra* note 42, at 223-24 (describing how the United Kingdom defended its sinking of an Argentinean warship during the Falklands conflict as a legitimate exercise of force to accomplish its objective of retaking the Falkland islands—a *jus ad bellum*, not *jus in bello* argument).

<sup>233</sup> See S.C. Res. 1483, *supra* note 219, ¶ 20, at 6 (mandating that "all export sales of petroleum, petroleum products, and natural gas from Iraq following the date of the adoption of this resolution...shall be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted."); Coalition Provisional Authority Regulation Number 2: Development Fund for Iraq (signed June 15, 2003), at <http://www.cpa-iraq.org/regulations/REG2.pdf>.

#### IV.C.6. Bukharas<sup>234</sup> to Booty: Souvenirs and War Trophies

##### IV.C.6.a. Individual War Trophies

A year after the United States-led invasion of Iraq, items touted as having come from Saddam's palaces have turned up for sale on the eBay internet auction site.<sup>235</sup> One Army enlisted soldier asked 850 dollars for a rug which allegedly had made its way from one of Saddam Hussein's palaces, to the soldier's aircraft hanger quarters in Baghdad, to his house in the United States. Was his acquisition lawful? Do *jus ad bellum* restrictions on property acquisition come into play with respect to "war trophies" or other souvenirs of war?

Initial *jus in bello* analysis begins by asking whether this property had any military usefulness. Providing creature comforts to improvised troop barracks could be defended as a military purpose, although of questionable necessity. Presumably the rug was Iraqi state-owned

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<sup>234</sup> A bukhara, also spelled bokhara, is a style of handmade carpet, typically red, originating in the Uzbekistan-Turkmenistan region. See 2 THE NEW ENCYCLOPÆDIA BRITANNICA 335 (15th ed. 1995).

<sup>235</sup> See Matt Smith, *Soldiers put Iraq 'war trophies' on eBay* (Mar. 18, 2004), at <http://www.cnn.com/2004/US/03/18/iraq.war.booty/index.html>. The article also reports on the removal of silverware embossed with the Iraqi Army's crest and copies of the Qu'ran.

property since it came out of a state-owned palace.<sup>236</sup> As such it was subject to seizure by invading or occupying forces if there was actual military necessity to do so.<sup>237</sup>

Provided the seizure was legitimate under *jus in bello* rules and passed title to the United States, could the United States then give the carpet to an individual soldier to take home as a war trophy or souvenir?<sup>238</sup> Since the United States had acquired title to the property by capture, arguably it could dispose of the property as it saw fit. On the other hand, dividing out booty to the troops is inconsistent with the general spirit of usufruct that governs an occupying power's treatment of public property.<sup>239</sup> At some point that palace will be returned to the Iraqi people, and there are not many good reasons why

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<sup>236</sup> Saddam Hussein's many palaces and their furnishings are treated as the property of the Iraqi State. See CPA Order No. 4, *supra* note 225 (containing Coalition Provisional Authority regulations on seizure of Baathist-owned property).

The U.S. Army's FM 27-10 provides guidance on identifying ownership. Military forces are to identify the degree of government control and management of the property, to determine who bears the loss if the property is appropriated. See FM 27-10, *supra* note 2, ¶ 394. If ownership is unknown, the presumption is that the property is state owned. *Id.* The purpose of this analysis is to determine whether there are private interests that must be compensate—not to determine whether the property can be seized.

A particularly fine antique oriental carpet of historic or artistic value could be classified as cultural property subject to even more strenuous protections. See discussion Part II.B.3 *supra*. If so, the most the occupying state would be authorized to do is protect the property, not acquire title to it. *Id.*

<sup>237</sup> Hague Convention of 1907, *supra* note 26, annexed regulations art. 53, 36 Stat. at 2308.

<sup>238</sup> This analysis assumes the carpet was given to the soldier by someone in a position of authority. If he took the property himself, he would be acting contrary to both international and U.S. law. See discussion on pillage at notes 84-94 *supra*; FM 27-10, *supra* note 2, ¶ 396 (observing that title passes to the United States and failure to turn over captured property to the United States is a violation of the Uniform Code of Military Justice).

<sup>239</sup> Article 55 of the Hague Regulations dealing with usufruct does not by its terms apply to enemy movable property. See Hague Convention of 1907, *supra* note 26, art. 55, 36 Stat. at 2309. However it does cover "public buildings" and these carpets furnish those public buildings. The "spirit of usufruct" can be viewed as another way of referencing *jus ad bellum* concerns about avoiding the appearance of a war of acquisition.

it should not contain the furnishings it had when the army found it.<sup>240</sup> But this is a *jus ad bellum*-inspired argument, since once title passes in accordance with the laws of war there should be no claim of illegality under *jus in bello*.

Thus, just as with boots, oil, and gold, *jus ad bellum* waits in the wings to put a lid on otherwise justified acquisitions of property. One rug here and there will not dent the international legitimacy of the war effort, especially if the takings are the infrequent and punishable missteps of individual soldiers.<sup>241</sup> But a state policy authorizing acquisition and dividing state-owned property among soldiers could cast doubt on the purposes for which the war was fought. Stripping public buildings of their accoutrements and fixtures has been the *modus operandi* of invading forces from the Vandals to the Nazis.<sup>242</sup> One is

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<sup>240</sup> Securing the property from theft by local inhabitants would be an appropriate action. Distributing the carpets to needy Iraqis would also be a fairly non-contentious disposition. Returning the furnishings to the palace ranks above passing out souvenirs to the troops.

<sup>241</sup> Article 103 of the Uniform Code of Military Justice (UCMJ), "Captured or abandoned property," proscribes improper disposition of property by military personnel as follows:

- (a) All persons subject to [the UCMJ] shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody, or control.
- (b) Any person subject to [the UCMJ] who –
  - (1) fails to carry out the duties prescribed in subsection (a);
  - (2) buys, sells, trades, or in any way deal in or disposes of captured or abandoned property, whereby he receives or expects any profit, benefit, or advantage to himself or another directly or indirectly connected with himself; or
  - (3) engages in looting or pillaging;shall be punished as a court-martial may direct.

10 U.S.C. § 903 (2004).

<sup>242</sup> See, e.g., Anthi Helleni Poulos, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis*, 28 INT'L J. OF LEGAL INFO. 1, 7 & 21-22 (2000)



hard-pressed to find military justification for taking the furnishings of publicly owned buildings as souvenirs.<sup>243</sup>

On the other hand, the opprobrium associated with passing out spoils to the troops may not attach to military accoutrements. For example, small caliber weapons and military memorabilia have historically been recognized as legitimate war trophies for individual soldiers by both United States law and military regulations.<sup>244</sup> Given the imperative military necessity in seizing military armaments and ironclad reasons for not giving captured military

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(describing the sack of Rome by the Vandals in 455 A.D. and the plunder of Europe by the Germans in World War II). One particularly notorious example of stripping a palace of its fixtures was the Nazi plunder of the Catherine and Alexander palaces in the Soviet Union in World War II. Everything valuable was removed, from parquet floors to paintings, tapestries to books. But the most infamous loss was the amber panels that decorated the eighteenth century Amber Room. The panels were crated and shipped back to Germany in 1941, disappeared in 1945, and have not been seen since. See Mikhail Shvidkoi, *Russian Cultural Losses During World War II*, in *THE SPOILS OF WAR* 67, 68-69 (Elizabeth Simpson ed., 1997).

<sup>243</sup> Soldiers should obtain their souvenirs just like other tourists—pay for them.

<sup>244</sup> Congress recognized that battlefield souvenirs have traditionally provided military personnel with a “valued memento of service in a national cause” and authorized the Secretary of Defense to prescribe regulations for vetting individual requests for military objects seized from the enemy. See 10 U.S.C. § 2579(a) & (b) (2004). 50 U.S.C. section 2205(5) exempts “minor articles of personal property which have lawfully become the property of individual members of the armed forces as war trophies pursuant to public written authorization from the Department of Defense” from rules governing disposition of the “spoils of war.” 50 U.S.C. § 2205(5) (2004). This exemption saves the Department of Defense from reporting requirements. See 50 U.S.C. § 2203 (2004).

The Department of the Army, pursuant to Secretary of Defense guidance, issued Army Regulation 608-4, which defines a “war trophy” as “any item of enemy public or private property utilized as war materiel (i.e., arms, military accouterments) acquired in a combat area or zone within a prescribed period of time, and authorized by the commander to be retained under the provisions of this regulation.” DEP’T OF ARMY, REG. 608-4, CONTROL AND REGISTRATION OF WAR TROPHIES AND WAR TROPHY FIREARMS, ¶ 4.b (Aug. 27, 1975) [hereinafter AR 608-4]. The same regulation defines a “war trophy firearm” as firearms up to .45 caliber and shotguns not prohibited by the National Firearms Act. *Id.* ¶ 4.d. AR 608-4 also lists multiple categories of property which may not be considered war trophies, including “[g]overnment-owned or privately owned articles of a household nature, objects of art or historical value, or articles of worth, such as silver or goldware, chinaware, linens, furniture, stamp collections, coin collections, gems, jewelry and paintings.” *Id.* ¶ 5.a(9). Saddam’s carpets would likely fall within that category. Also excluded is “any item, article, or piece of equipment obtained in violation of international law.” *Id.* ¶ 5.a(12). Clearly the drafters of this regulation, and Congress for that matter, must not believe that there are any international law restrictions against the designation of war material as war trophies.

hardware back,<sup>245</sup> the military will almost inevitably be left with piles of captured weapons. Most will be destroyed or turned over to national security forces when sovereignty is returned to an occupied country. But a few may be rendered inoperable and mounted on plaques to memorialize life-defining events for military men and women in combat.<sup>246</sup> Unlike handing out Persian rugs, this practice does not smack of personal or national enrichment. The value of such property is primarily symbolic, not monetary. Few would accuse a country of going to war to obtain military wall ornaments for its troops.

#### **IV.C.6.b. Unit and National Level War Trophies**

War trophies are also acquired at the unit or even the national level. Military units request permission to retain certain captured artifacts as "historical items" to decorate the halls of the unit headquarters back home as a memorial to the combat action, a teaching tool, or a source

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<sup>245</sup> See discussion regarding arms depots Part IV.C.3 *supra*.

<sup>246</sup> The requirement that souvenir weapons be rendered unserviceable prior to giving them to an individual service member appears in the statute, but does not show up in the Army Regulation on the topic. Compare 10 U.S.C. § 2579(b)(5)(B) with AR 608-4, *supra* note 244.

of inspiration and esprit de corps.<sup>247</sup> Other items find their way to a nation's military museums.

The U.S. Army takes a proactive approach to acquiring objects of historical significance whenever the United States is involved in an armed conflict.<sup>248</sup> The Chief of Military History deploys a historical property recovery coordinator and recovery teams alongside combat troops with the mission to systematically collect, identify, register, and return to the United States significant historical artifacts relating to the U.S. Army, its allies, or its enemies.<sup>249</sup> They identify and acquire the best of the "spoils of war" for Army historical collections and museums.<sup>250</sup>

While the vast majority of significant historical artifacts will be military-associated property, such as tanks, firearms, or unit regalia, the Army's museum

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<sup>247</sup> See DEP'T OF ARMY REGULATION 870-20, ARMY MUSEUMS, HISTORICAL ARTIFACTS, AND ART, ¶ 3-4 (Jan. 11, 1999) [hereinafter AR 870-20] (defining "historical collections" as collections of artifacts displayed in a regimental rooms, trophy rooms, visitor's centers, halls of fame, exhibit areas, officer's and non-commissioned officer's clubs, community centers, chapels, lobbies of headquarters' buildings, and even outdoor "static displays" of large items like tanks, aircraft, and vehicles).

<sup>248</sup> This includes what the military terms "military operations other than war," or operations below the thresholds set by common article 2 of the Geneva Conventions. See, e.g., Geneva Convention-Civilians, *supra* note 32, art. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

<sup>249</sup> See AR 870-20, *supra* note 247, ¶¶ 1-4.a(2)(b) & 4-4.

<sup>250</sup> AR 870-20 cites the Spoils of War Act of 1994, Pub. L. No. 103-326, 108 Stat. 482 (codified at 50 U.S.C. §§ 2201-2205 (2004)), as authority for the capture of material during combat service or military operations other than war for retention in Army historical collections. *Id.* ¶ 4-4.e(5)(a). While that act covers domestic authority, the regulation also notes that the exact nature of the artifacts recovered will vary depending on the nature of operations, international law, and agreements in effect—or in other words *jus in bello* rules. *Id.* ¶ 4-4.e(1); See discussion regarding title transfer in military operations other than war note 104 *supra*. The Spoils of War Act itself defines "spoils of war" as "enemy movable property lawfully captured, seized, confiscated, or found which has become United States property in accordance with the laws of war"—another cross-reference to *jus in bello* rules. See 50 U.S.C. § 2204(4).

regulation provides for the entire spectrum of property recovery, to include artwork.<sup>251</sup> The closer such property comes to meeting the definitions of cultural property, the more *jus in bello* rules will limit the acquisition of such property by attacking or occupying forces.<sup>252</sup> Operating at magnitudes of order above individual soldiers acquiring souvenir firearms, systematic property acquisition during armed conflict or other military operations will require careful oversight to ensure the legitimacy of the war is not undermined. The words of caution inserted by Congress into the statute authorizing individual war trophies applies equally to larger scale acquisitions:

[I]t is the policy and tradition of the United States that the desire for souvenirs in a combat theater not blemish the conduct of combat operations or result in the mistreatment of enemy personnel, the dishonoring of the dead, distraction from the conduct of operations, or other unbecoming activities.<sup>253</sup>

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<sup>251</sup> See AR 870-20, *supra* note 247, ¶¶ 1-4.f(1) (tasking unit commanders with identifying any objects or works of art of particular significance to their organization acquired through service or captured enemy equipment), 2-5.q(3) (routing captured foreign works of art through the U.S. Army Center of Military History, Ft. McNair, Washington D.C., for review and processing), & app. D (listing artwork among twelve nomenclature categories for artifacts).

<sup>252</sup> See discussion Part II.B.3 *supra*.

<sup>253</sup> 10 U.S.C. § 2579(a) (2004).

#### **IV.C.7. Bells to Booty: The Seizure of Cultural Property**

##### **IV.C.7.a. Misused Cultural Property**

On September 28th, 1901, church bells were rung by insurgents in the Philippine village of Balangiga, Samar, to signal the commencement of a surprise attack on Company C of the 9th U.S. Infantry Regiment. The troops were stationed in the village to keep the peace in America's newest colony, recently purchased from Spain. Rebels wielding bolo knives and disguised as church-going women killed forty-eight American soldiers. In retaliation, General Jake "Howling" Smith ordered U.S. troops to retake the island and turn it into a "howling wilderness." The successful campaign to retake the island took place at a high cost in Philippine lives. The troops took the bells as war trophies, two of which are now on display at F.E. Warren Air Force Base in Wyoming, and one of which is still with the 9<sup>th</sup> Infantry in Korea.<sup>254</sup>

This incident occurred prior to the Hague Convention of 1907. In context the United States likely acquired good

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<sup>254</sup> See Slobodan Lekic, *Battle's Heavy Toll Resounds in Conflict Over Church Bells*, WASH. POST, Apr. 8, 1998, at A21; Rolando Borrinaga, *Balangiga History not Clear as a Bell*, PHIL. DAILY INQUIRER, Aug. 4, 2001, at A14.

title to the bells when it acquired the Philippines by treaty.<sup>255</sup> But suppose this same scenario played out in modern day Iraq. Could an attacking or occupying force legitimately take permanent possession of church bells if the bells had been misused by the enemy?

Cultural property has received the most stringent of protections under international treaty law, as set out in section II.B.3. *supra*. Church bells easily fit into the definitions for cultural property laid down by the Hague Convention of 1907, the Hague Convention of 1954, and other treaties concerning cultural property.<sup>256</sup> Capture or destruction of cultural property does not generally give the attacker a military advantage or constitute a valid military objective in war.

Misuse of cultural property can convert it into a valid military target.<sup>257</sup> For example, enemy fighters firing from the minaret of a mosque, which ordinarily would

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<sup>255</sup> The United States was ceded the Philippines by Spain for \$20,000,000 in the Treaty of Paris, Dec. 10, 1898, 30 Stat. 1754. See GEORGE E. TAYLOR, *THE PHILIPPINES AND THE UNITED STATES: PROBLEMS OF PARTNERSHIP* 53 (1964). Thus the United States was not acting as an occupying power; it had instead taken possession of the Philippines as a territory of the United States. The bells would have become the property of the United States immediately if they were previously owned by Spain, or at least after their misuse to launch an insurgency if they were private property of the Catholic Church. This transfer would have been a domestic action, not a transfer between sovereigns regulated by the laws of war at that time. In 2003 a majority in Congress apparently believed that the United States owned the bells, because they passed a House Resolution urging the return of one of the bells to the Philippines asserting that "[t]he United States holds supportable legal title to the bells recognizable under international law and the United States Government has final disposition over the bells of Balangiga...." H.R. 268, 108th Cong. (1st Sess. 2003).

<sup>256</sup> See Part II.B.3.a. *supra*.

<sup>257</sup> See, e.g., Hague Convention of 1907, *supra* note 26, annexed regulations art. 27, 36 Stat. at 2303 (obligating parties to spare cultural properties "provided they are not being used at the time for military purposes").

be protected from attack, would strip that minaret of protection under the laws of war and provide justification for destroying it if necessary.<sup>258</sup> Likewise in the Bells of Balangiga scenario, the bells arguably played a military role in triggering a sneak attack, removing some degree of protection. That being the case though, a proportionate response sufficient to meet the military necessity would be to temporarily remove and sequester the bells to prevent further misuse. Seizing the bells for use as war trophies by contrast appears disproportionate and unnecessary, especially in light of multiple international conventions curtailing the "illicit" transfer of cultural property out of an occupied country.<sup>259</sup>

Finally, even if acceptable *jus in bello* justifications are made to explain how the Bells of Balangiga were legitimately captured, ultimate disposition will still be critical to international appearances. For example, the fact that a hypothetical enemy took up

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<sup>258</sup> See, e.g., Hague Convention of 1954, *supra* note 26, art. 4.2, 249 U.N.T.S. at 244 (permitting acts of hostility against cultural property where military necessity imperatively requires a waiver to the protection ordinarily afforded).

<sup>259</sup> See discussion regarding the prohibition against exporting cultural property Part II.B.3.c(1) *supra*, and restrictions on title transfer Part II.B.3.d *supra*. Restrictions on title transfer are built on the premise that cultural property does not serve a military purpose. Given the protections afforded cultural property, misuse of cultural property for a military purpose should not remove protection any farther than is absolutely required, and should not reverse prohibitions against title transfer. Against these principles, powerful national sentiments may weigh in favor of seizing the bells. As Marian Cromley wrote in an article for the *Washington Post*, "[b]ells were tempting war booty. After life and death struggles, the victor craves a trophy—a scalp, a flag, a weapon belonging to the fallen. A religious bell is perfect. It is like taking the heart of the enemy." Marian Cromley, *The Secret Bell of Arlington: War Booty for an Admiral, A Sacred Symbol Returns to Okinawa*, WASH. POST, May 7, 1989, at B5.

fighting positions around a National Museum of Art (in violation of international conventions) would not give the attacking country justification to seize the artwork within the museum for any reason beyond temporary protection.<sup>260</sup> The more cultural property the world community sees exported by an occupying power from an occupied territory, the faster that country runs the risk of crossing the *jus ad bellum* redline of legitimate war.<sup>261</sup> The international community will subject such transfers to strict scrutiny and likely urge the return of such property at the conclusion of hostilities.

#### **IV.C.7.b. Ideological Cultural Property**

Certain forms of property that might otherwise qualify as cultural property subject to protection may in fact be targeted for destruction or seizure on account of the

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<sup>260</sup> Even claims of repatriation for purposes of "protective custody" may give rise to protest if the justification is seen as a cover for acquiring cultural property. In 1945, thirty-two officers with the U.S. Monuments, Fine Arts and Archives office, responsible for repatriating artwork stolen by Germany, signed a petition now known as the "Wiesbaden Manifesto." It decried plans to ship 202 German paintings to Washington for "protective custody," when clearly there was no military necessity for the policy. The authors stated "no historical grievance will rankle so long, or be the cause of so much justified bitterness, as the removal, for any reason, of a part of the heritage of any nation, even if that heritage may be interpreted as a prize of war." See Walter I. Farmer, *Custody and Controversy at the Wiesbaden Collecting Point*, in *THE SPOILS OF WAR* 131, 133 (Elizabeth Simpson ed., 1997). Protective custody arguments also got short shrift from the Nuremberg Tribunal, which rejected German defendant's arguments that they were seizing art treasures to preserve them, as opposed to enriching Germany. See *The Nurnberg Trial*, 6 F.R.D. at 123.

<sup>261</sup> If a state takes an action with respect to cultural property that is clearly inconsistent with humanitarian law, it could be committing what Greenwood has termed a "double illegality." See Greenwood, *supra* note 42, at 227. The action would not only be illegal at the *jus in bello* level, but could also hardly be considered a reasonable and proportionate measure in support of legitimate war objectives at the *jus ad bellum* level. See *id.*



disfavored message the property is thought to convey. For example, following World War II the Allies undertook a concentrated campaign to "de-Nazify" Germany.<sup>262</sup> As many as 9000 works of art were confiscated by the United States in Germany under this policy and repatriated to the United States.<sup>263</sup> Over the years many of the works have been returned to Germany, but anywhere between 800 and 6000 pieces still remain in U.S. custody.<sup>264</sup> Statues and pictures of freshly overthrown dictators also tend to have a limited lifespan—witness the much-publicized pulling down of Saddam Hussein's statue in Baghdad's Firdos square at the conclusion of the Second Gulf War.<sup>265</sup>

When considered from a *jus in bello* perspective, operations to convey or restrict certain messages can serve vital military purposes. The military frequently refers to such campaigns as psychological operations (a.k.a. psyops). Where operations to win the hearts and minds of the

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<sup>262</sup> See Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural Property Laws*, 65 TENN. L.R. 691, 713 (describing how as a result of agreements between the United States, United Kingdom, and Soviet Union at Yalta, the Allies undertook a campaign to seize cultural objects that glorified Nazi tenets or German militarism); Nikolai Nikandrov, *The Transfer of the Contents of German Repositories Into the Custody of the USSR*, in THE SPOILS OF WAR 117, 119 (Elizabeth Simpson ed., 1997) (providing an overview of de-Nazification seizures in accordance with decrees of the Allied Control Council in occupied Germany).

<sup>263</sup> Drimmer, *supra* note 262, at 715.

<sup>264</sup> *Id.* at 715 & n.155. The U.S. Center for Military History maintains custody of the artwork. *Id.* at 691 n.1. See also Price, 69 F.3d at 46-52 (addressing title to four watercolors by Adolph Hitler seized by the U.S. Army in 1945 as "militaristic Nazi object[s]").

<sup>265</sup> See, e.g., Craig Nelson & Larry Kaplow, *War In The Gulf: Reaction: Baghdad*, ATLANTA J.-CONST., Apr. 10, 2003, at 3B. The toppling of Saddam's statue was not purely an act by local Iraqis—the U.S. Marine Corps lent its heavy machinery to the task. *Id.*; see also Nikandrov, *supra* note 262, at 120 (discussing Directive No. 30 of the Allied Control Council, which ordered all Nazi monuments, posters, and statues be completely destroyed and eliminated, except for "objects of extraordinary intrinsic value").

populace involve removing disfavored symbols that qualify as cultural property, conflicting norms emerge. On the one hand, the rules regarding the protection of cultural property counsel against destruction or seizure.<sup>266</sup> On the other hand, an occupying power may have a legitimate interest in removing vestiges of a violent regime which precipitated the military action in the first place. A portrait of a deposed dictator like Saddam Hussein is interchangeable with the regime itself and could be used as a rallying point for regime sympathizers. Furthermore, if the artwork itself could be categorized as a form of hate speech, its suppression gains additional support from international conventions such as the International Covenant on Civil and Political Rights (ICCPR).<sup>267</sup>

The most prudent course of action for invading or occupying powers encountering disfavored cultural property would be to capture and sequester the items vice destroying them. This may not be possible with hulking statues. But portable oil paintings and sculptures could relatively easily be boxed up and shipped to a safe location. The

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<sup>266</sup> See discussion Part II.B.3.b *supra*.

<sup>267</sup> See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 20.2, S. TREATY DOC. NO. 95-2, at 23, 29 (1978), 999 U.N.T.S. 171, 178 ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."). Jonathan Drimmer argues that the multicultural interests underlying protections for cultural property do not support protecting cultural property that promotes the dominant themes of a genocidal culture, such as Nazism. See Drimmer, *supra* note 262, at 695. Thus, an exception to international and domestic laws giving protection to cultural property should be made for "violently culturally intolerant" property. *Id.* at 750-51.

cultural heritage of mankind is not confined to its happiest moments—many important lessons for future generations emerge from dark periods in history, such as wars and reign of totalitarian regimes. Sequestration allows the passage of time to delink the disfavored ideology from the artwork, or delink the disfavored ideology from the society in question, allowing it to be displayed or preserved in context as an object lesson for future generations.<sup>268</sup> Ironically the cultural manipulation and destruction carried out by the Nazis themselves illustrates the danger of destroying disfavored cultural property. Hitler launched a systematic campaign to sell or destroy “degenerate” artwork, which in Hitler’s twisted world included works by Jews, Slavic artists, and modern art.<sup>269</sup>

Given inherent international skepticism against seizing another nation’s cultural property in the face of strong humanitarian law to the contrary, ideological

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<sup>268</sup> Sequestration also has the virtue of preserving art against overzealous censors. For example, most of the Nazi artwork still retained by United States does not explicitly glorify “eliminationist” tenets, according to Jonathan Drimmer who viewed the art. *See* Drimmer, *supra* note 262, at 723. Instead it depicts Teutonic, nationalistic, or patriotic themes. *Id.* Drimmer believes that viewed in context—i.e. art produced by Nazis attempting to infuse the German populace with Aryan militaristic ideology—the artwork still merits repression. *See id.* at 723, 750-51. Future generations may not agree.

<sup>269</sup> *See* Mathew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT’L LAW 1, 2-5, 7, 25-27 (1998); *See also* Marie Hamon, *Spoilation and Recovery of Cultural Property in France, 1940-94*, in THE SPOILS OF WAR 63, 65 (Elizabeth Simpson ed., 1997) (describing one incident in July 1943 in which the Germans gathered five to six hundred works of “degenerate” art, including modern paintings by Masson, Picabia, Leger, Braque, and Picasso, and burned them in the Tuileries Garden in Paris).

justifications for seizing cultural property will also be scrutinized to separate truth from pretext. A nation's subsequent conduct with the property will go far to separating a sham justification from a real concern for suppressing a dangerous ideology.

An example of a dubious justification being challenged involved a shipment of 202 pieces of German artwork after World War II from Germany to Washington D.C for "protective custody."<sup>270</sup> Thirty-two United States officers in Germany tasked with protecting and repatriating German and German-looted artwork signed what became known as the "Wiesbaden Manifesto." They protested that there was no military necessity for moving the artwork to protect it, given that protective depots were up and running in Germany and the war was over.<sup>271</sup> Therefore the United States' action, whether altruistic or a bid to acquire prizes of war, resembled actions the Germans had taken for which they were now facing trial before war crimes tribunals.<sup>272</sup> Eventually the United States returned the artwork to Germany and no more shipments of art were made to the United States for "protective custody."<sup>273</sup> To the extent it appeared the United States was acquiring German artwork for its own

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<sup>270</sup> See Farmer, *supra* note 260, at 133.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

museums, the policeman became the thief and the legitimacy of U.S. actions was called into question. Given the enormity of World War II, this tempest in a teapot posed little threat of weakening the legitimate justifications for which the allies had gone to war in the first place.<sup>274</sup> But in a more borderline resort to force, *jus ad bellum* justifications could be weakened by perceived pretextual acquisition.

By contrast with the preceding illustration, the Nazi artwork seized by the United States for ideological purposes has remained hidden from view for almost sixty years, and for all we know it may remain locked away for another sixty years before a determination is made that it is safe to display or repatriate the remaining pieces.<sup>275</sup> This tight control bolsters U.S. claims that its actions are genuinely targeted at suppressing a dangerous ideological message, not acquiring property. And that in

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<sup>274</sup> Cf. Greenwood, *supra* note 42, at 223 (observing that for a conflict on the scale of World War II, it is unlikely *jus ad bellum* concerns would have any real significance). On the other hand, the value of holding the moral high ground when prosecuting an armed conflict or occupation cannot be overstated. Cf. Robin Wright, *Powell Reaches Out To an Arab Audience*, WASH. POST, May 16, 2004, at A23 (describing acknowledgement by U.S. Secretary of State Colin Powell at the World Economic Forum that the United States is now widely criticized for abuse of prisoners at the Abu Ghraib prison in Iraq). Secretary Powell reportedly said "[w]e knew the region would look at these photos [of prisoner abuse] and say, 'is this the America that we believed in? Is this the America whose value system we have looked at and admired for so many years?'" *Id.*

<sup>275</sup> Congress passed a law in 1982 permitting the Secretary of the Army to return seized artwork to the German government, provided it receive clearance from a committee designed to ensure the art was not "inappropriate for such transfer." Act of Mar. 17, 1982, Pub. L. No. 97-155, 96 Stat. 14 (1982).

turn lends credibility to the *jus ad bellum* purposes for which the war was fought.

## V. Conclusion

Throughout the 19th and 20th centuries, two roads have converged toward one objective: the elimination of war and its evil effects. The first approach was to acknowledge that as long as there are independent states competing for limited resources, there will be war. Thus humanitarian law, or *jus in bello* rules were created to confine war to the field of battle and minimize suffering by people and property not directly involved in the fighting.<sup>276</sup> The Conventional restrictions on property acquisition in the Hague Convention of 1907, the Geneva Conventions, UNESCO Conventions and their associated protocols have greatly restricted acquisition of cultural property, but the rules for seizing public and private property are still facially quite permissive.

The second approach attacked the root of the evil by seeking to outlaw war. Two devastating world wars in the 20th century gave new impetus to this visionary goal.

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<sup>276</sup> Of course war-fighters receive protection against unnecessary suffering and perfidy among other rules, but that is not the subject of this paper.

After a rough start with the League of Nations, a retooled United Nations has proven relatively effective in addressing breaches of the peace. Perhaps its most valuable influence is its role as the international jury with near-universal membership. States judge the legitimacy of other state's actions, and if necessary, take action in accordance with the U.N. Charter. Resort to force has been removed from the menu of state policy options, unless another state commits a breach first. In that situation a state may either defend itself alone or collectively, and obtain assistance with United Nations-authorized forces. This parallel track sought to constrain the *jus ad bellum* aspects of war--i.e. the reasons a state could legitimately use force. The power of collective action and the precedent of the Nuremberg war crimes tribunals puts teeth in U.N. directives.

These two paths converged and reinforced each other. First, because recourse to force will be legitimate only for narrowly specified objectives, *jus ad bellum* will remain a factor throughout the conflict, as opposed to ceasing to have importance after the first shots are fired. The world jury will be watching to ensure state justifications are not just pretexts for national enrichment. A state's actions will need to be bounded by

both military necessity and proportionality. Property acquisition in violation of *jus in bello* rules will instantly raise red flags.<sup>277</sup> Property acquisition legitimate by *jus in bello* rules, but disproportionate in reference to the objectives of the conflict will also bring condemnation on the malefactor. Condemnation in the Post-Nuremberg United Nations era can lead to sanctions, armed force in opposition, obligations for restitution and reparations, and individual criminal liability for both aggressive war and war crimes.

These *jus ad bellum* influences may be creating new customary international law further curtailing a state's freedom to dispose of acquired property as it pleases.<sup>278</sup> First, with regard to public property—historically the clearest source of spoils—there is an increasing tendency to apply the principles of usufruct to a wider spectrum of assets. This concept emerged from the Nuremberg judgment as the tribunal criticized Germany's plunder of occupied territories. It also be gleaned from restrictions on the export of cultural property from occupied territories—restrictions which could be broadened to other classes of material in the future. International oversight of state

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<sup>277</sup> For instance the seizure and export of cultural property.

<sup>278</sup> Customary law traditionally requires both an objective element (state practice) and a subjective element (*opinion juris*, which means states follow the practice out of a sense of legal obligation). See CARTER, *supra* note 172, at 124.



property acquisition demands greater transparency in property disposition. The spirit of usufruct can be seen hovering around our examples of oil (e.g. the Coalition forces and the development fund in Iraq), gold (e.g. the Allies treatment of German gold acquisition as "loot"), and even dual-use property such as boots. Red lights flash whenever property is exported out of the occupied territory. The greater the export the better accounting the occupying state had better be keeping. The largest exception to increasing constrictions on property acquisition is actual military weaponry, whose acquisition and disposition will nearly always be considered necessary and proportional. This may also explain the continued resiliency of a carve-out from rules against personal and national enrichment for war trophies of a military character.

The second and somewhat related tendency may be a preference for property control versus property acquisition. The rule has assumed mandatory status for cultural property. Even when property is misused (e.g. the Bells of Balangiga) or ideological in nature (e.g. Nazi art) the better answer is to sequester the property until conditions have changed allowing its release to the

original owner.<sup>279</sup> Sequestration can also be applied to private or public property seized to deny its use by the enemy. Sequestration and transfer to the proper authorities may also be a requirement for certain conflicts below the level of international armed conflict, such as invitational interventions into an existing host state that would not be characterized as an occupation.

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<sup>279</sup> This paper is only focused on property acquisition. Other options such as destruction may also be available, though highly disfavored given the permanent consequences.